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No. 8094

Vol 1934

United States Circuit Court of Appeals

For the Ninth Circuit.

THAMAN SINGH,

Appellant,

vs.

EDWARD L. HAFF, District Director of Immigration, Naturalization for the port of San Francisco,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Appellant:

JOSEPH P. FALLON, Esq.,
550 Montgomery Street,
San Francisco, Calif.

For Appellee:

HENRY H. McPIKE, Esq.
United States Attorney,
San Francisco, Calif.

In the Southern Division of the United States District Court, for the Northern District of California.

No. 22138-R.

In the Matter of

THAMAN SINGH,

(Alien-East Indian; Immigration No. 12020/22525)
ON HABEAS CORPUS.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable United States District Judge now presiding in the United States District Court in and for the Northern District of California, Southern Division:

The petitioner, THAMAN SINGH, respectfully shows:—

That he is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward L. Haff, District Director of Immigration and Natural-

ization at the port of San Francisco, at the Immigration Station at Angel Island, County of Marin, State of California, and within the jurisdiction of the above entitled court; that the imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to-wit:

That your petitioner was taken into custody on or about June 7, [1*] 1934, under United States Department of Labor warrant dated April 7, 1934; that your petitioner was charged in the aforesaid warrant with having entered the United States at a port unknown subsequent to July 1, 1924, and is in the United States in violation of the Immigration Act of 1924 in that he is an alien ineligible to citizenship and not exempted by paragraph C, Section 13 thereof; that your petitioner was given various hearings before the Immigration officials since the aforesaid date of arrest and after consideration by the Department of Labor of the evidence submitted, was ordered deported; that your petitioner at the aforesaid hearings, proved that he had legally entered the United States and never departed therefrom; that your petitioner showed that he arrived on the ss "Minnesota" March 4, 1912, at the port of Seattle, Washington; that it is admitted by the Immigration authorities that your petitioner was admitted to the United States on the aforesaid date but that subsequent to his entry he had departed from the United States. In the

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Summary, Exhibit "A", (p. 5, par. 6, and p. 6, par. 1), is contained the following statement:—

> The alien sets up the claim that he first entered the United States on the steamer "Minnesota" March 4, 1912, and produces two East Indian witnesses to testify to that fact. There was introduced by the Government and marked Exhibit "J" the record of one Thaman Singh, age 26, who arrived on the steamer "Minnesota" at the port of Seattle, Washington, February 28, 1912. It is the contention of this alien that this record of entry pertains to him. However, due to the fact that there is so little information contained thereon, I am of the opinion that Exhibit "J" may or may not pertain to his entry into the United States as claimed. All of the documents the alien has introduced in his behalf are those showing that he did at one time prior to the year 1912 actually reside in the Philippine Islands, although Government Exhibit "J" does show on line 5 that the person covered by this record of entry was married, and it is reasonable to presume that this does actually pertain to this alien. However, although it is believed that the alien actually did enter the United States as claimed in the year 1912 it is also believed that he did not remain in the United States for any length of time.
>
> It is my opinion that the alien left the United States a few years after his entry in 1912 and

for many years thereafter resided and remained and was employed by many ranchers and land owners in the Mexicali district of Mexico. The alien has not presented any witnesses who can testify that he lived in the United States subsequent to the year 1912. The witnesses who testified that he arrived in the United States with them at Seattle in 1912 also testify that they did not see the alien between that time and 1930. [2]

That your petitioner is informed and believes and therefore alleges the fact to be that the Secretary of Labor issued the aforesaid deportation order solely on the ground that certain Mexican witnesses, citizens and residents of Mexico, viz: JOSE GASTELLUM, ENCARNACION PEDRO CARRILLO, ANTONIO BEJARANO. FRANCISCO BEJARANO, and ALEJANDRO JEREZ, testified that your petitioner was in Mexico subsequent to July 1, 1924, and that therefore he had lost any right to remain in the United States that he might have acquired prior to the aforesaid date; that your petitioner alleges that the identifications of your petitioner by the aforesaid Mexican witnesses were made through a photographic likeness of your petitioner and your petitioner affirms that said identification is not of sufficient weight and legality under the law to warrant an order of deportation.

Yee Et (Ep) v. U. S., 222 Fed. 66;

Backus v. Owe Sam Goon, 235 Fed. 847;

White v. Tom Yuen, 244 Fed. 739;
Ex parte Bunji Une, 41 Fed. (2) 239;
Lee Mea Yong, U. S. D. C. N. D. C. No. 18161 on habeas corpus, discharged March 28, 1924, on ground that photographic identification was insufficient.

That your petitioner alleges he has never left the United States since his arrival therein in the year 1912, and your petitioner further alleges that there is not sufficient evidence contained in said record to sustain the immigration authorities in ordering his deportation from the United States after his many years of residence therein, and denying your petitioner his liberty.

That there is attached hereto and made a part hereof, marked Exhibit "A", a copy of the Summary of the examining inspector of immigration, and a copy of Brief, marked Exhibit "B", filed by George W. Hott, Esq:. counsel for the alien before the Department of Labor.

That your petitioner asks that the court make an order releasing him on bail during the further proceeding in said matter before this court, as he has been so at liberty on bond given before the [3] Immigration authorities which terminated upon his surrender into custody after the Department of Labor had ordered him deported. The bond under which he has been at liberty since his arrest is in the sum of ONE THOUSAND ($1000.00) DOLLARS.

That it is the intention of said District Director of Immigration and Naturalization to deport your petitioner out of the United States and away from the land of which he has been a resident for more than 23 years by the ss "President Pierce", sailing from the port of San Francisco on the 18th day of October, 1935, at the hour of 4 o'clock P. M., and unless this court intervenes to prevent said deportation your petitioner will be deprived of residence within the United States, where he has lawfully so long resided.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue as prayed for, directed to the District Director of Immigration and Naturalization, and directing him to hold the body of your petitioner within the jurisdiction of this Court, and to present your petitioner before this Court at a time and place to be specified in said order, together with the time and cause of his detention, so that the same may be inquired into, to the end that your petitioner may be restored to his liberty and go hence without day; and that the Court release the said petitioner upon bail during this proceeding in the sum of ONE THOUSAND ($1000.00) DOLLARS, the same amount of bail that has been posted with the Immigration authorities since his arrest June 7, 1934.

Dated: San Francisco, California, October 14th, 1935.

JOSEPH P. FALLON
Attorney for Petitioner.

(Verification.)

[Endorsed]: Filed Oct. 14, 1935. [4]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Good cause appearing therefor, and upon reading the verified petition on file herein:

IT IS HEREBY ORDERED that Edward L. Haff, District Director of Immigration and Naturalization for the Port of San Francisco, appear before this Court on the 4th day of November, 1935, at the hour of 10:00 A. M. of said day, to show cause, if any he may have, why a writ of habeas corpus should not issue herein as prayed for, and that a copy of this order be served upon the District Director, and a copy of the petition and order be served upon the United States Attorney for this District, his representative herein.

IT IS FURTHER ORDERED that the said Edward L. Haff, District [5] Director of Immigration and Naturalization, as aforesaid, or whoever, acting under the orders of the said District Director, or the Secretary of Labor, shall have the custody of the said THAMAN SINGH, or the master of any steamer upon which he may have been placed for deportation by the said District Director, are hereby ordered and directed to retain the said THAMAN SINGH within the jurisdiction of this Court until its further order herein; and

IT IS FURTHER ORDERED that the petitioner, THAMAN SING, be released upon bail in the sum of ONE THOUSAND ($1000.00) DOLLARS, pending proceedings in the matter.

Dated: San Francisco, California, October 14th, 1935.

MICHAEL J. ROCHE
United States District Judge.

[Endorsed]: Filed Oct. 14, 1935. [6]

[Title of Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE AND EXCERPTS OF TESTIMONY.

Comes now EDWARD L. HAFF, as District Director of Immigration and Naturalization for the Port of San Francisco, California through Arthur J. Phelan, as Inspector in Charge, Legal Division of the United States Immigration and Naturalization Service at said port, regularly assigned hereunto by said District Director of Immigration and Naturalization, and for cause why a writ of habeas corpus should not issue herein, shows as follows:

I.

That the person in whose behalf the petition for writ of habeas corpus was filed, is detained by your respondent Edward L. Haff, as District Director of Immigration and Naturalization for the Port of San Francisco, California, under and by virtue of a warrant of deportation duly and regularly issued by the Secretary of Labor of the United States after a hearing duly and regularly held before an Immigrant Inspector of the United States. [7]

II.

That a copy of said warrant of deportation and the original record of the entire proceedings pertaining thereto are annexed hereto and made a part hereof as Respondent's Exhibits "A" and "B".

III.

That for the convenience of the Court there are also annexed hereto and made a part hereof as Respondent's Exhibit "C", excerpts of testimony from the original immigration record heretofore referred to as Respondent's Exhibits "A" and "B".

WHEREFORE, Respondent prays that the petition for writ of habeas corpus herein be dismissed.

ARTHUR J. PHELAN

Inspector in Charge, Legal Division as aforesaid, hereunto authorized for and on behalf of Respondent Edward L. Haff, District Director of Immigration and Naturalization. [8]

EXHIBIT "C".

[Title of Court and Cause.]

RESPONDENTS' EXCERPTS OF TESTIMONY FROM THE ORIGINAL RECORD.

The witnesses herein are:

THAMAN SINGH, petitioner, a male native and citizen of East India, 45 years of age.

KHUSHIA SINGH, a native of East India and resident of Clovis, California.

PAKHAR GUNDO, 75 years of age, a native of East India and resident of Fowler, California.

JOSE GASTELLUM, 37 years of age, a taxicab driver, citizen of Mexico and resident of Calexico, California.

ENCARNACION PEDRO CARILLO, 42 years of age, a miner, citizen of Mexico and resident of Calexico, California.

ANTONIO BEJARANO, 38 years of age, a rancher, citizen of Mexico and resident of Paredones, B. C., Mexico.

FRANCISCO BEJARANO, 40 years of age, a policeman, citizen of Mexico and resident of Mexicali, Mexico.

ALEJANDRO JEREZ, 31 years of age, a farm laborer, citizen of Mexico and resident of Casey, B. C., Mexico.

PEDRO GONZALES, 41 years of age, a ranch foreman and resident of Westley, California.

MANUEL VELASCO, 30 years of age, a resident of Firebaugh, California.

ED HARNAN, Hindu, an employee of the Bridal Veil Lumber Company of Bridal Veil, Oregon. [9]

KHUSIA SINGH AND PAKHAR GUNDO appeared in petitioner's behalf. The other witnesses named testified for the government.

The Secretary of Labor has ordered the petitioner deported to India on the ground that he is in the United States in violation of the Immigration Act of 1924 in that at the time of his entry he was not in possession of an unexpired immigration visa

and on the further ground that he is in this country in violation of said Act in that he is an alien ineligible to citizenship and is not exempted by paragraph (c) Section 13 thereof.

There is set forth below from the immigration record of the testimony upon which the administrative decision is based:

I.

Petitioner testified on February 3, 1933 as follows:

"Q. What is your true name?

A. Thaman Singh.

Q. Have you ever used any other name?

A. No sir.

Q. What is your age, date and place of birth?

A. Little over 45 years old; I don't know the date of my birth; born in the village of Tallewal, State of Patiala, Punjab, India."

(Respondent's Exhibit "A", p. 145.)

"Q. When did you come to the United States?

A. March 4, 1912, on the steamer Minnesota; landed at Seattle, Washington."

* * * * * * *

"Q. Have you ever been outside of the United States since you came to the United States in 1912?

A. No sir."

* * * * * * *

"Q. Have you ever been married?

A. No never.

Q. Did you ever have a wife in India?

A. No sir."

(Id. p. 146)

And on October 4, 1934, he testified as follows:

"Q. After you landed from the steamer where did you go?

A. I stayed about a week in Seattle, and then I went to Portland, Oregon, where I worked for the Minard (phonetic) Lumber Company.

Q. How long did you work for that Company?

A. For about three or four years."

* * * * * * *

"Q. When did you leave Oregon?

A. I left Oregon about 1920.

Q. Where did you go from Oregon?

A. Then I came to California."

(Id. pp. 33 and 34). [10]

"Q. Have you always remained in California since your arrival here?

A. No. I went back to Oregon again.

Q. How long did you stay there at that time?

A. I stayed in Oregon about one year at that time.

Q. Who did you work for in Oregon at that time?

A. I worked for the Linton (phonetic) Lumber Company."

* * * * * * *

"Q. After you had worked for this lumber Company a year where did you go then?

A. Then about 1924 I went to Utah.

Q. Who did you work for in Utah?

(No answer).

Mr. FALLON: I wish to introduce in evidence and have marked Exhibit "H" for the alien letter signed by H. H. Rainey, on letterhead of the A. S. & R. Co., dated Sept. 30, 1932, certifying that this alien was a laborer at that plant in 1924 and 1925."

(Id. p. 35).

"Q. When did you start to work in Garland, Utah?

A. I started to work in Garland either in May or June of 1924.

Q. When did you quit?

A. In May or June, 1925.

Q. What was the name of the Company you worked for in Garland?

A. The Salt Lake Garland Company.

Q. What kind of work did you do?

A. I was dumping the ore.

Q. Who was your foreman at that place?

A. I don't remember his name. But his name is given on the letter that was issued to me.

Q. Do you know any other East Indians who worked in that smelter at that time?

A. There was no East Indians working at that time when I worked at that place."

(Id. p. 53).

The following is quoted from a communication dated May 23, 1933 addressed to the immigration authorities by the Employment Department of the American Smelting & Refining Company of Garfield, Utah:

> "Thamen Singh worked at the Garfield Plant of the A. S. & R. Co., from 5/6/1925 to 5/8/1925 and from 11/24/1925 till 12/14/1925.
>
> His personal examination record in our files shows him to be 48 years of age, now. (Born 1885). He was 5 feet 9 inches tall and weighed 175 pounds. We have his signature on file here, and would be glad to compare it for you.
>
> The enclosed photo is not recognized by anyone in this office as Singh.
>
> Before coming to Garfield, Utah, he gives his record as having worked on the Western Pacific Railroad section gang for two years and farming in California, previous to that. From here he went to Bingham, Utah where we last heard of him there on December 15, 1925."
>
> (Id. p. 127).

The following is quoted from a report dated October 25, 1934, covering an investigation conducted by the immigration authorities at the Garfield Plant of the American Smelting and [11] Refining Company.

> "Following is an extract taken from the employment record of a Thamen Singh who was employed at the Garfield plant:

Complexion—dark
Eyes—black
Hair—dark
Beard—dark (mustache)
Build—stocky
Carriage—straight
Weight—175 lbs.
Height—5′ 9″
Date of birth—1885
Place of birth—Sangrana Punjab India
Widower.

Under the title of former employer is shown: Farmer in California, years not given; Western Pacific Railroad, section hand, two years; years not given. This man worked at the plant on two different occasions. The first occasion, from 5/6/25 to 5/8/25, he worked in the flue dust under flue dust contractor J. E. Griffith; then from 11/24/25 to 12/14/25 he worked in the surface department."

(Id. p. 132).

Petitioner testified on January 7, 1935, as follows:

"Mr. Fallon to Thaman Singh alias Thomas Singh:

Q. How tall are you?

A. About five feet six and a half or seven.

Q. What is your weight?

A. I weigh about a hundred and thirty-five but I weigh sometimes about a hundred and fifty.

Q. Calling your attention to Government Exhibit "S" which is report from the American Smelting & Refining Co. at Garfield, Utah, it states that their records show that you are 48 years of age and that you were born in 1885, and it says that the man was 5′ 9″ tall and weighed a hundred and seventy five pounds. Do you weigh a hundred and seventy-five pounds?

A. No. I never weighed a hundred and seventy-five pounds. The most I ever weighed was a hundred and fifty.

Q. How was that report then. It evidently refers to you. It gives the height 5′ 9″ and the weight as a hundred and seventy-five pounds.

A. I am not that tall and I never weighed a hundred and seventy-five pounds, but I might have made a mistake at the time of my employment there.

Q. Did they measure you?

A. Yes. I was measured over there.

Q. You state that you did work for the American Smelting & Refining Company, however?

A. Yes.

Q. How long did you work there?

A. About a year."

(Id. p. 70).

And on February 5, 1935 he testified as follows:

"Q. Did you write to the American Smelting and Refining Company for a report on the time you worked there?

A. Yes. [12]

Q. Did you receive a reply?

A. Yes, they wrote me a letter.

Q. Did they describe your appearance in the letter?

A. Yes, they wrote a description in that letter.

Q. Does that correspond with the description given in this report here?

A. No. It does not correspond with this statement."

(Id. pp. 77 and 78).

"Mr. FALLON: At this time I will offer in evidence the letter which the alien received from the American Smelting & Refining Co. under date of January 11, 1935, in answer to one evidently written by him.

EXAMINING OFFICER: The letter presented is marked Exhibit "L" for the alien. It is noted that part of the information contained in Government Exhibit "V" as to the date of birth, height, are the same as in the letter which has been presented on behalf of the alien.

Examining Officer

to Thaman Singh, alias Tomas Singh:

Q. You have previously stated that there was a difference in the description. What difference is there between the letter previously introduced on January 11, 1935, and Government Exhibit "V"?

A. The difference I mean is that when I was employed they didn't measure me. It was approximately taken as 5′ 9″, and also they didn't weigh me but just made a guess at it."

(Id. p. 78).

The following is quoted from application for reentry permit No. 773205, signed by one Thaman Singh on November 28, 1928 and filed with the immigration authorities:

"NAME: (Print full name) THAMAN SINGH

Place of birth SANGRANA (INDIA)

Date Sept. 23, 1883

* * * * * * *

Place of business or employment Western Railroad Co., Portola—Salt Lake City

* * * * * * *

Personal description:

Age 45, Height 5 ft., 9 inches, Weight 175 lbs."

(Id. p. 126).

Petitioner testified on October 4, 1934, as follows:

"Q. Did you ever make application for a return permit?

A. No. I never did."

(Id. p. 41).

"Q. Calling your attention to this application for return permit No. 773205, do you know that man whose likeness is attached thereto?

A. Yes, I know him.

* * * * * * *

Q. Have you ever seen this alien since you have been in the United States?

A. Yes, I saw him when he went to India."

(Id. p. 49). [13]

"Q. Do you know what this man's name is?

A. I don't know his real name but when he came to this country he called himself by the name of Thaman Singh."

(Id. p. 50).

"EXAMINING OFFICER: There is introduced and made a part of the record a communication from the American Smelting & Refining Company at Garland, Utah, dated September 11, 1933, bearing the signature of one Thaman Singh from the employment records of that Company, same being marked Government Exhibit "H". There is introduced and made a part of the record the signature of the subject alien Thaman Singh, signed at his hearing today, and marked Government Exhibit "I".

(Id. p. 54).

"Q. Is this your signature on Exhibit "H"?

A. Yes.

Q. When did you make that signature?

A. I didn't know how to write. Sometimes I write this way and sometimes in a different way.

Q. Your attention is invited to your signature on certificate of registration at Manila, P. I., which is an entirely different signature. How do you account for that fact?

A. I could not write very good.

Q. It will be noted that you make the letter "A" after the "H", whereas in the signature in Government Exhibit "H", the letter after "H" appears to be "U". Instead of "Thaman" it appears to be Thuman. How do you account for that?

(No answer).

By Mr. FALLON: Q. Are these signatures your signatures and did you sign those papers?

A. Yes, those are all my signatures, and that last one is better because I have practiced writing."

(Id. p. 60).

II.

Petitioner testified on January 7, 1935 as follows:

"Q. How far from the city of Salt Lake City was the plant that you worked at for the American Smelting & Refining Company?

A. There was fifty cents fare from Salt Lake City to Garfield.

Q. How far from Garfield was the plant situated?

A. The fare was fifty cents from Garfield to the smelter.

Q. Can you give me a rough sketch of how the plant is situated? In what direction is it from Garfield, north, south, east or west?

A. I don't know the directions. [14]

Q. I will ask you what was the name of the town you lived in during your employment with

the American Smelting & Refining Company at Garfield, Utah?

A. I was living right around the smelter.

Q. What was the name of the town you were living in near the smelter?

A. The name of the town is Garfield too.

Q. Did you ever hear of a town called Smeltertown?

A. Yes.

Q. Were you ever in Smeltertown?

A. Yes.

Q. Where is Smeltertown located?

A. Smeltertown is quite a distance from the place where I worked.

Q. How far from the place where you worked was Smeltertown, approximately?

A. Either fifteen or twenty miles, I am not sure."

(Id. p. 72).

"Q. How large a place is Smeltertown.

A. It is not a very big town, but it is a good looking town."

(Id. p. 73).

And in the same connection he testified on February 5, 1935, as follows:

"Q. I show you a photograph marked Government Exhibit "Y", the dimensions of which are about 5"x6", and ask you if you recognize that photograph as any place where you have ever worked?

A. From the picture I cannot identify the place because I am not a photographer.

Q. Did you ever see that place?

A. I may have seen it but I can't recognize it.

Q. I will show you another photograph marked Government Exhibit "Z" and ask you if you recognize that place as any place where you have ever worked?"

* * * * * * *

"A. I don't know. Salt Lake City is a pretty big town and Portland is a very big town and so is Seattle.

Q. Do you remember of working in any place that appears like the photographs marked Exhibit "Z"?

A. There are lots of mills I worked in Salt Lake City that looks like that, and the mill where I worked in Tacoma also looks like that, and also Seattle and Portland.

Q. For your information this photograph marked Government Exhibit "Z" is a photograph of the Garfield plant of the American Smelting & Refining Co., which you previously testified that you worked for in 1924. Can you identify the picture now, it having been explained to you that it is a picture of a plant where you claim to have worked in 1924?

A. Yes. I can recognize it now.

Q. I will ask you to point out the different places for me. Can you tell me what this build-

ing is indicated by a circular Mark No. 1 on the photograph?

A. I can't tell from the picture."

(Id. p. 75). [15]

The following is quoted from a report dated October 25, 1934, covering an investigation conducted by the immigration authorities at the Garfield Plant of the American Smelting & Refining Company:

"Enclosed you will find a rude freehand sketch showing in a crude way the location of the several buildings at the Garfield plant. As an explanation, Great Salt Lake lies directly to the north and extends around to the northwest of this plant. The plant is built up against the base of a high mountain to the east and south. As will be noted, in the northwest corner there is what is called Smeltertown. This town is composed of five rows of small two, three, and four-room houses, numbered as shown, Row A, B, C, D and E. In 1924 there was a store located in practically the center of Smeltertown, ran by two men by the name of Speers and Butters."

(Id. p. 133).

III.

Petitioner testified on October 4, 1934, as follows:

"Q. After you left the employ of the American Smelting & Refining Co. at Garland, Utah, where were you next employed?

A. Then I was employed by Bradeville Lumber Co. (phonetic) in Oregon.

Q. In what city in Oregon is the Bradeville Lumber Co. located?

A. Portland.

Q. Was it situated right in the city of Portland?

A. I don't know how far from Portland but I remember the fare on a street car was a dollar."

* * * * * * *

"Q. Did you go on a steam train or was it an electric train?

A. An electric car."

* * * * * * *

"Q. What month and year did you start your employment with this company?

A. Either in April or March, 1926.

Q. When did you leave this company?

A. Either in October or November, 1929. When the mills were stopped I quit.

Q. What month in 1929 did you quit?

A. Either October or November.

Q. What was the name of your boss in that mill?

A. The name of the boss was Surain Singh.

Q. What was the name of the white foreman?

A. I don't remember, but I have written for it and will send it to you.

Q. Do you know any other white persons employed by that Company?

A. I don't remember any of their names but I remember many East Indians were working there at that time.

Q. How many East Indians were working there at that time?

A. About a hundred East Indians were working in that mill at that time." [16]

* * * * * * *

"Q. After you left the employ of this mill where were you next employed?

A. I lived there at the mill waiting for it to open up for about a year, and then I came back to California."

(Id. pages 54, 55 and 56).

"Q. Well after you left the Bradeville Lumber Company where did you go?

A. Then I came to California.

Q. What part of California?

A. In 1930 I came to California, but I didn't work any place—just bumming around."

(Id. p. 36).

"Q. Did you work between the time you left in October, 1929, at the Bradeville mill, and the time you went to work in January, 1931, on the Farm Ranch near Wasco?

A. No, I didn't work during that time."

(Id. p. 57).

A report made by Immigration Inspector M. C. Pommarane dated November 1, 1934, is quoted as follows:

"In the case of THAMAN SINGH the writer called at the office of the Bridal Veil Timber Company at Bridal Veil, Oregon yesterday. Examination of their records from 1925 to and including 1930 revealed that during this period the Company had working for them eight Hindu aliens, working contract work piling lumber and around the dry kiln. These Hindus were all Singhs, and worked in groups of two and three as follows:

Gang #1—Jawala Singh, Nadha Singh, Ram Singh.

Gang #2—Sarian Singh, Harry Singh.

Gang #3—Booja Singh, Dee Singh, Sam Singh.

(The gang designations are mine).

"In addition to the eight named above there was another Hindu Harnan Singh, who started working for the Company in 1909 and worked with white men during that period but was used as an interpreter and was recognized as the boss of the Hindu aliens.

"There was no white man now employed by the Bridal Veil Timber Company who admitted having any contact with the Hindus employed by the Company in 1925 to 1930 and so I took a statement from the Hindu alien Harnan Singh or Ed Harnan, only. That statement attached.

"There never has been an electric car or train running to Bridal Veil from Portland, this

service being steam train and bus. The fare by steam train during the period when the alien claims to have been employed at 'Bradeville' was ninety-five (95) cents.

"From the foregoing it would appear that our surmise as to Bridal Veil being the 'Bradeville' referred to by the alien is correct as there is no other town or company of any similar name known locally or to Mr. George Cromwell, the publisher of 'The Timberman' the lumbermens official organ."

(Id. p. 136). [17]

In this connection Ed Harnan testified as follows on October 31, 1934:

"Q. How long have you worked for the Bridal Veil Lumber Company?

A. Twenty-six years.

Q. Have you worked continuously during that period of time?

A. Yes, from 1909 to 1921 for the Bridal Veil Lumber Company and from 1921 until now for the Bridal Veil Timber Company.

Q. Were you working here during the period from 1925 to 1930 when the Bridal Veil Lumber Company employed a number of Hindus?

A. Yes.

Q. During the period of 1925 to 1930, did the man of whom this is a photograph ever work here? (Shown photograph identified as Thaman Singh—12020/22525—25996).

A. No.

Q. Did you ever see that man?

A. No, I never been anywhere but Portland and Bridal Veil.

Q. Do you know a man by the name of THAMAN or TOMAS SINGH?

A. No, I don't.

(Id. p. 137).

Petitioner testified in the same connection on February 5, 1935, as follows:

EXAMINING OFFICER: There is introduced in evidence and marked collective Exhibit "W" for the Government, the following: A communication dated Portland, Oregon, November 1, 1935, signed by the Divisional Director at that port, photograph of Thaman Singh and a report by Immigrant Inspector M. O. Pommeraine, together with a sworn statement taken by Inspector Pommerane from one Ed Harnan, at the Bridal Veil Timber Co. at Bridal Veil, Oregon, October 31, 1934, in which Mr. Harnan states that he has worked for the Bridal Veil Timber Co. from 1909 to 1921, and from 1921 to the present date after it changed its name to the Bridal Veil Timber Company.

Examining Officer

to Thaman Singh alias Tomas Singh:

"Q. There is a report here from Mr. Ed Harnan, who states that he has worked for the Bridal Veil Timber Company for the past 26 years. He was shown your photograph and

states that he does not know you and that he has never seen you in Bridal Veil, Oregon. Did you ever work for the Bridal Veil Lumber Company or the Bridal Veil Timber Company of Bridal Veil, Oregon?

A. Yes."

(Id. pages 78 and 79). [18]

"Mr. Fallon to

Thaman Singh alias Tomas Singh:

Q. How did you get from Portland to the plant at Bridal Veil?

A. One can go from Portland to Bridal Veil by bus and train.

Q. A steam train?

A. Yes, a steam train."

* * * * * * *

"By EXAMINING OFFICER: "Q. Could you go from Portland to Bridal Veil on a street car?

A. No. You can go by stage on the Columbia Highway.

Q. On page 32 of the testimony on October 4, 1934, you were asked the question, 'was it situated right in the city of Portland?' Answer: 'I don't know how far from Portland but I remember the fare on the street car was a dollar.' How do you account for such a statement as that?

A. I told my attorney before that that was a slip of the tongue. I meant to say stages or

locomotive trains. I mentioned electric trains but I meant locomotive trains.

Q. How do you account for the fact that on page 32 of the testimony of the same date you were asked the question, 'Did you go on a steam train or an electric train?' Answer: 'An electric train.'

A. I made that statement under the wrong impression. I had forgotten. I didn't reflect enough."

(Id. pages 80 and 81).

IV.

Antonio Bejarano testified on February 14, 1934, as follows:

"Q. What has been your occupation since 1921?

A. When we first came to Paredones in 1921, we opened a meat market. I was with my father and brothers in that business until May, 1925. During that period it was my work to sell meat among the ranchers and other people who lived in the Paredones District, from a wagon. From May, 1925 until two years ago I worked for the Union Oil Company at Paredones, Mexico."

* * * * * * *

"Q. During the period of time that you resided at Paredones, Mexico, were you acquainted with any people of the East Indian or Hindu race?

A. I knew lots of them by sight. During the time I sold meat from the wagon, I was out among the workers in that district practically every day. About the first part of 1924 quite large numbers of those Hindus came into the Mexicali District and most of them were employed in the near vicinity of Paredones and Tecolote, B. C., Mexico. I sold meat in the camps where they lived just about every day, and I came to know many of them by sight."

* * * * * * *

"While I was working for the Union Oil Company, I trucked gasoline and oil to the ranches and construction projects and there were many Hindus employed at those places, and I became acquainted with many of them then. Among the places that I took gas and oil were the Globe Mills and the [19] Delta Canal Company. Both those companies employed large numbers of Hindus. A few of those people I became quite friendly with and I knew them by name.

Q. If you were shown photographs of any of those Hindu people who were in contact with during your residence in Paredones, Mexico, would you be able to positively identify them by their photographs?

A. Some of them I am positive that I would. I might not be able to tell you just what camp or ranch or construction project they were employed on as they changed places quite

often. However, if you have any photographs of those Hindu people, I will tell you if I know them, and if I am able, I will tell you just where they were.

Q. I will now show you a photograph of a man and ask if you have ever seen him? (Shown photograph of THAMAN SINGH, San Francisco file No. 12020/22525, Fresno file No. 815/836, being one of a group of 65 photographs shown the witness.)

A. Yes, I know that fellow. That is Tomas Singh. He was in the Mexicali Valley for many years. The last time I saw him was in 1931 when he was on a truck with a man by the name of Garcia. They were hauling wire from Paredones, B. C., Mexico to Shank No. 1 Ranch of the Colorado River Land Company near Cierro Preito, B. C., Mexico. Tomas was a Hindu who did not mingle much with the other Hindus. He always worked and associated with Mexicans. He had a Mexican sweetheart at Palaco, B. C., Mexico. They lived right across from the Gas Station. Most everybody in the Mexicali District knows Tomas. Tomasito (Diminutive of Tomas) was a very good friend of mine, but I have told you that I would tell the truth, so I must tell you that he was there in Mexico."

(Id. pages 152 and 153).

Francisco Bajarano testified on October 14, 1934 as follows:

"Q. Since September, 1924 have you come in contact with or been acquainted with any people of the Hindu or East Indian race?

A. Yes, while I was stationed at Paredones, B. C., Mexico, the Globe Mills employed quite large numbers of those people during the years 1924, 1925 and 1926. There were some Hindus employed by that company for a year or two after that. My duties took me to the various ranches and construction projects where those Hindu people were employed and lived, and I came to know many of them by sight. They also came into Paredones and Tecolote to buy provisions and for various other reasons, and I saw many of them in those places."

(Id. p. 154).

"Q. I will now show you a photograph of a man and ask you if you have ever seen him? (Shown photograph of THAMAN SINGH, San Francisco file No. 12020/22525, Fresno file No. 815/836, being one of a group of 65 photographs shown the witness). [20]

A. Yes, I know that Hindu well. He was around in the Mexicali, Mexico District for many years. He was usually working and living with Mexicans. He did not associate much with other Hindus. We all knew him by the name of Tomas Singh. The last time I saw him was in 1931."

(Id. p. 155).

Alejandro Jerez testified on March 7, 1934, as follows:

"Q. How long have you resided in the Mexicali, Mexico District?

A. Since around 1921.

Q. During the time of your residence in the Mexicali District, have you been employed on any ranches where East Indian or Hindus have been employed or have resided?

A. Yes, in 1926 I worked on the Stevenson ranch south of Cuervos, B. C., Mexico where many Hindus were employed. During 1929 and part of 1930 I worked at camps No. 9 and 10 on the Hechicera ranch at Hechicera, B. C., Mexico where there were many Hindus employed and many other Hindus were in that district either looking for work or to visit the Hindus who were employed on the Hechicera ranch. I also drove a taxi cab in Mexicali from 1924 to 1926 and saw many Hindus there and also in Colonia Abasolo near Mexicali, Mexico. I also worked on Shenk ranch No. 1 south of Palaco, B. C., Mexico during part of 1924 and part of 1930. There were Hindus employed there also.

Q. If you were shown photographs of any of those Hindus who were employed on ranches where you worked or whom you have seen in the Mexicali District, would you be able to positively identify them?

A. Yes, some of them at least.

Q. I will now show you a photograph of a man and ask you if you have ever seen him? (Shown photograph of THAMAN SINGH, San Francisco file No. 12020/22525, Fresno file 815/836, being one of a group of 71 photographs shown the witness).

A. Yes, I first saw him at Shenk No. 1 ranch working for the Colorado River Land Company. The last time I saw him was in Mexicali in 1931. When he was on the Shenk ranch he was boarding at Alberto Gonzales' place at Shenk No. 1½ ranch. I know him as well as I know my hand. This Hindu speaks the best Spanish of all the Hindus. This fellow never ran around with other Hindus, he was always with Mexicans."

(Id. p. 156).

Jose Gastellum testified on August 12, 1933, as follows:

"Q. Do you at times carry people in your taxicab to various ranches in the vicinity of Mexicali?

A. Yes.

Q. Have you in the past ever taken Hindus to various ranches from Mexicali?

A. Yes.

Q. I will present you with a photograph of a Hindu and will ask you if you have ever seen this [21] (Shown photograph of Thaman Singh which accompanied letter from Fresno office dated May 20, 1933).

A. Yes.

Q. Where have you seen him?

A. I took him in my taxicab to a ranch about 8 miles east of Mexicali. It is a small ranch and I do not know the name of it. It was in 1930 but I do not remember exactly the month. It may have been around June."

* * * * * * *

"Q. Did you see this Hindu later in Mexico?

A. Yes, I saw him in Mexicali about three months after the time I took him to the ranch.

Q. You state very positively that you know this Hindu, Thaman Singh, from a photograph of him. Explain why you are so certain that this is the Hindu that you knew in Mexicali.

A. One day about three years ago this Hindu accosted me on the street in Mexicali and asked me if I would take him to his ranch about eight miles east of Mexicali and I told him that I would. He asked me how much it would cost and I told him 8 or 9 pesos, I don't remember just which, but the Hindu said 'Well, I am not ready to go just yet, let's go and have a drink of beer'. So we went to a bar and were drinking beer and other drinks for some three or four hours before I took him to the ranch. Then some two or three months later I saw this Hindu again in Mexicali and he came over to me and said 'How are you', and we conversed for possibly an hour at that time. After being with him for this length of time there is no question at all as to whether or not I know

him. I am positive that this Hindu whose picture you have is the same Hindu whom I took to a ranch east of Mexicali and talked with later on the streets of Mexicali sometime during the summer of 1930.

Q. Do you know this Hindu's name?

A. No.

Q. Was anyone with you at the time you took this Hindu to the ranch east of Mexicali?

A. Yes, an uncle of mine by the name of Pedro Carrillo was with me.

Q. I want to ask you again, are you positive that the Hindu whose picture I have shown you was the same Hindu who you saw in Mexicali in 1930?

A. Yes, I am positive he is the same.

Q. Are you acquainted with the Hindus, that is generally speaking, who live in Mexicali and vicinity?

A. Yes, I know I believe all of them by sight but I do not know more than 2 or 3 of their names."

(Id. pages 148 and 149).

Encarnacion Pedro Carillo testified on August 18, 1933 as follows:

"Q. I will present you with a photograph of a Hindu and will ask if you have ever seen this Hindu before. (Shown photograph of Thaman Singh which accompanied letter from Fresno office dated 5/20/33). [22]

A. Yes.

Q. Where have you seen him?

A. I saw him in an automobile in Mexicali in the summer of 1930.

Q. Whose automobile was he in?

A. Jose Gastellum's automobile.

Q. What class of automobile was this?

A. It was a taxi.

Q. You state very positively that you knew this Hindu, Thaman Singh, from this photograph of him. Kindly explain why you are so certain that this is the Hindu you saw in Mexicali.

A. He was in this taxi with Jose Gastellum and Jose asked me if I wanted to take a ride with him and we took the Hindu to a ranch about eight miles east of Mexicali."

* * * * * * *

"Q. I want to ask you again are you positive that the Hindu's picture I have just shown you is the same Hindu whom you saw in Mexicali in 1930?

A. Yes, I am positive he is the same one.

Q. Why are you so positive of this?

A. His jaws are so wide and his face is long."

(Id. pages 150 and 151).

Petitioner testified in this connection on October 4, 1934, as follows:

"EXAMINING OFFICER: There is introduced into the record and marked Exhibit

"B" sworn statement of Jose Gastellum, dated August 18, 1933; there is introduced in evidence and marked Exhibit "C" sworn statement of Encarnacion Pedro Carrillo, taken at Calexico, California, August 18, 1933; there is introduced in evidence and marked Exhibit "D" sworn statement of Antonio Beharano, taken at Calexico, California, February 14, 1934; there is introduced in evidence and marked Exhibit "E" sworn statement of Francisco Bejarano, taken at Calexico, Calif., February 14, 1934; there is introduced in evidence and marked Exhibit "F" sworn statement of Alejandro Jerez, taken at Calexico, California, March 7, 1934.

(The contents of the exhibits referred to are read to the alien by the interpreter.)

"Q. Have you any comment to make regarding the statements that have just been read to you?

A. After hearing the statement of one of the witnesses I feel that the rest of them are probably the same way, and I am sure all of it is not true."

(Id. pages 29 and 30).

"Mr. Fallon to
Thaman Singh alias Tomas Singh:

* * * * * * *

"Q. Were you ever in Mexico?

A. No."

* * * * * * *

"Q. The Government has introduced certain affidavits of Mexican citizens to the effect that you were [23] in Mexico in 1930. Were you there at that time?

A. No.

Q. Do you know Jose Gastellum?

A. No.

Q. He states that he saw you in Mexico in 1930. Is that true?

A. No.

Q. The Government has also introduced a sworn statement by Encarnacion Pedro Carrillo, a Mexican, to the effect that he saw you in Mexico about 1930. Is that correct?

A. No. It is not true.

Q. What were you doing in the year 1930?

A. The lumber mills were stopped so I didn't do anything but just travel around having a good time."

* * * * * * *

"Q. In 1931 Mr. Antonio Bejarano states that he saw you in Mexico. Is he correct?

A. No.

Q. Also Francisco Bejarano states the last time he saw you was in 1931 in Mexico. Is that correct?

A. No.

Q. Now do you know any of these Mexicans?

A. No.

Q. Can you get any evidence from the Oregon companies that you worked for similar to that letter from Utah?

A. I can get it if I go there but I don't have the money. I spent all I made.

Q. Did you ever send any money back to India?

A. No.

Q. Have you any documents, such as pass books from a bank or anything of that nature?

A. No. I never deposited any money in any bank. I just make it and spend it."

(Id. pages 39 and 40).

And on February 5, 1935 he testified as follows:

"Q. You are advised that the Government will gladly cooperate with you in every way to enable you to cross-examine these witnesses at Calexico, California. You will be afforded every opportunity this office can grant to have these witnesses presented at Calexico for cross-examination. There is no provision in our rules and regulations, however, whereby these witnesses may be brought to this district for cross-examination. However, if you will inform this office within fifteen days of the date you wish to have these witnesses produced at Calexico, this office will make the necessary arrangements and notify your attorney. Do you desire to avail yourself of this opportunity?

A. I am a poor man and I can't go over there, and if I do go there I will have to hire

an attorney there for cross-examination, and I don't see how I can go because I don't have the money. However, I will think it over.

Q. You will be given fifteen days to notify this office, in writing, as to whether you will avail yourself of the opportunity to cross-examine the Government witnesses at Calexico within the thirty succeeding days. Do you understand?

A. Yes."

(Id. pages 82 and 83). [24]

The following quoted statement was made by petitioner's attorney on March 11, 1935:

"Mr. FALLON: Under date of February 18th I received a communication from Mr. Thaman Singh, which letter reads as follows:—

'As I was told by you that I had to appear before immigration commission at Calexico, California, for my testimony, I may say that at present I cannot bear the expense of my trip and as well as my counsel. But later on, in September or October, I might have some money left after paying your fee. Then I could go there. Or else if the Immigration Department is bearing all expense I am willing to go at any time they may so desire.' At this time I would like to ask a continuance, as expressed by the alien, to September or October, 1935, if it is agreeable to your office.

EXAMINING OFFICER: Such a continuance cannot be granted the alien."

(Id. pages 85 and 86).

Pedro Gonzales testified on June 28, 1934 as follows:

"Q. Have you ever been in Mexico?

A. Yes. I worked as a foreman, first for the Globe Mills Company and then for the Colorado Land Company, both ranches located in Mexico near Mexicali.

Q. How long did you work for the Globe Mills Company?

A. Four years. I started in 1921 and worked until 1925.

Q. How long did you work for the Colorado River Land Company?

A. I worked there in 1925, 1926, 1927, 1928, up until the Fall of 1929 when I returned to the United States.

Q. During the time you were foreman of these two ranches did you have any Hindus working for you?

A. Yes, when I worked for the Colorado River Land Company I had about fifteen or sixteen Hindus working for me. I didn't have any Hindus working for me when I was with the Globe Mills Company. (Photograph of Thaman Singh, alias Tomas Singh, San Francisco file 12020/22525, exhibited to witness).

Q. Who is that?

A. That is Tomas Singh or Tomas Juan. He worked for me in Mexico while I was foreman for the Colorado River Land Company.

He worked for me for about one year during 1926 and 1927.

Q. Did he work for you in Mexico at any other time?

A. No. When I left there he began working for my brother Alberto Gonzales.

Q. Are you positive that the picture that I just showed you is the same Hindu whom you state is Tomas Singh or Tomas Juan who worked for you on this ranch at the time mentioned?

A. Yes.

Q. Did he work immediately under your supervision and did you pay him his wages?

A. Yes, I was immediately over him in the work and I also gave him his check each time. The pay checks were made out individually to each Hindu and I paid him each week." [25]

* * * * * * *

"Q. After Tomas Singh stopped working under you on that ranch in 1927, where did he go to work?

A. He went to work for my brother, Alberto on the other ranches of the same company.

Q. Where is Tomas Singh at the present time?

A. He is in the United States."

* * * * * * *

"Q. Was he still in Mexico at the time you came to the United States in 1929?

A. Yes, he was still working for my brother Alberto at that time. I don't know just when he did come to the United States.

Q. Have you seen him in the United States?

A. I saw him one time in Chinatown, Fresno, last year and my brother Pablo, who was then in the United States, but who is now in Mexico, told me that Tomas Singh was then working on the Wilson Ranch near Fowler, Calif.

Q. Did you talk to Tomas Singh when you saw him in Fresno at that time?

A. Yes, I said hello and we talked about Mexico. He said he came from Mexico. We didn't talk very much. I didn't have much time because I had my wife and had to go see the doctor."

(Id. pages 119 and 120).

Manuel Velasco testified on June 28, 1934, as follows:

"Q. During the time you worked in Mexico, did you ever have Hindus working for you?

A. Yes. In 1927 was the first time I worked Hindus, and also in 1928 while I was foreman for the Colorado River Land Company.

(Photograph of Thaman Singh, alias Tomas Singh, San Francisco file 12020/22525, exhibited to witness).

Q. Who is that?

A. That is Tomas Juan or Tomas Singh who worked for me when I was foreman for the

Colorado River Land Company in Mexico. He worked for me in 1927 and part of 1928.

Q. During the time he worked for you, did you have immediate supervision of his work and pay his checks?

A. Yes. I paid him by individual check each week, drawn by the Colorado River Land Company on the Mercantile Bank of Mexicali.

Q. About how many months altogether did this man work with you when you were foreman for that company?

A. I am not sure now. When those boys were not working for my brothers-in-law Alberto and Pedro Gonzales, they would work for me. This Tomas Singh worked for me about a year off and on.

Q. Are you positive that the person represented by this photograph (indicating photograph of Thaman Singh, alias Tomas Singh, San Francisco file 12020/22525) is the same person who worked for you during the time mentioned in Mexico?

A. It is.

Q. Have you seen him in the United States at any time?

A. I have. I saw him in 1933 in January and February at the Wilson Ranch near Fowler, Calif., and in Chinatown in Fresno, Calif."

(Id. pages 122 and 123). [26]

In this connection petitioner testified on October 4, 1934, as follows:

"EXAMINING OFFICER:

* * * * * * *

There is introduced at this time and made a part of the record a sworn statement taken at Westley, California, from Pedro Gonzales, dated June 28, 1934, and marked Government Exhibit "N". There is introduced and made a part of the record and marked Exhibit "O" sworn statement of Manuel Velasco, taken at Firebaugh, California, June 28, 1934. There is introduced in evidence and marked Government Exhibit "P" the photograph of Thaman Singh used in identification in connection with the statements designated as Exhibits "N" and "O".

(The contents of Exhibits "N" and "O" are read to the alien by the interpreter.)

"Q. Have you any comments to make regarding those exhibits?

A. The statements that have been read to me are all false.

Q. Do you know a man named Pedro Gonzales?

A. No.

Q. Do you know Manuel Velasco?

A. No."

(Id. p. 58).

"Q. Who did you work for in 1932?

A. Then I worked for Wilson, and since that time I am still working for him.

Q. Did you work for Wilson from 1932 to the present time?

A. Yes.

Q. Where is his ranch located?

A. In Fowler, California."

(Id. p. 37).

V.

Khushia Singh testified on October 4, 1934, as follows:

"Q. Do you know this alien Thaman Singh?

A. Yes, I know him.

Q. Was he on the "Minnesota" with you.

A. Yes. He was on the same boat.

Q. You are satisfied that this is the same man that landed at Seattle with you in 1912. Is that correct?

A. Yes, he is the same man.

Q. Have you seen him since that time?

A. I did not see him after landing for a long time."

(Id. p. 42).

"Q. How often have you seen this man since you landed with him in 1912?

A. I just saw him in the last two years after we landed at Seattle in 1912.

Q. Do you know anything about this alien where he worked since he came to this country?

A. I don't know where he worked. Sometimes he worked one day one place and two days in another place. I don't know where he worked."

(Id. p. 43). [27]

"Q. Do you think this man remained in the United States all the time since his arrival in 1912?

A. I can't tell because I don't know."

* * * * * * *

"Q. Could this alien have left the United States between the time you entered with him in 1912 and the next time you saw him, without your knowledge?

A. No. I don't know whether he left the country or not.

Q. But if he had left the country would you know that he had left the country or would you be in a position to know that he had left the country?

A. No. I wouldn't know whether he left or not."

(Id. page 44).

Pakhar Gundo testified on October 4, 1934, as follows:

"Q. When did you first come to the United States?

A. I came to the United States perhaps in 1912.

Q. Do you remember the name of the ship you came here on?

A. I think the name of the steamer was "Minnesota."

* * * * * * *

"Q. Do you know this Thaman Singh?

A. Yes.

Q. Was he on that steamer "Minnesota" that docked in 1912 at Seattle?

A. Yes."

* * * * * * *

"Q. How often have you seen him since 1912?

A. After landing at Seattle in 1912 I saw him in 1931 in Fresno."

(Id. p. 46).

"Q. Could this alien have left the United States without your knowledge during the time you state you didn't see him from 1912 to 1931?

A. I don't know whether he left the country or not. I don't know."

(Id. p. 48).

H. H. McPIKE, AJZ
United States Attorney,
Attorney for Respondent.

[Endorsed]: Filed Nov. 18, 1935. [28]

In the Southern Division of the United States District Court for the Northern District of California.

No. 22,138-R.

In the Matter of

THAMAN SINGH

On Habeas Corpus

ORDER.

The application for a writ of habeas corpus (by order to show cause) having been heretofore submitted, it is, after a full consideration,

Ordered that the application for a writ of habeas corpus be and the same is hereby DENIED: that the petition be and the same is hereby DISMISSED; that the order to show cause be and the same is hereby DISCHARGED; and that the applicant be deported by the Immigration Authorities at San Francisco, California.

Dated: December 20th, 1935.

MICHAEL J. ROCHE
United States District Judge.

[Endorsed]: Filed Dec. 20, 1935. [29]

District Court of the United States, Northern District of California, Southern Division.

AT A STATED TERM of the Southern Division of the United States District Court for the Northern District of California, held at the Court

Room thereof, in the City and County of San Francisco, on Friday, the 20th day of December, in the year of our Lord one thousand nine hundred and thirty-five.

Present: The Honorable MICHAEL J. ROCHE, United States District Judge.

[Title of Cause.]

Pursuant to a signed order this day filed, it is Ordered that the application for a writ of habeas corpus be and the same is hereby denied; that the petition be and the same is hereby dismissed; that the order to show cause be and the same is hereby discharged; and that the applicant be deported by the Immigration Authorities at San Francisco, California. [30]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Clerk of the above-entitled Court; to Edward L. Haff, District Director of Immigration and Naturalization for the port of San Francisco; and to H. H. McPike, Esq., United States Attorney, his attorney:

You and each of you will please take notice that Thaman Singh, the petitioner in the above-entitled matter, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment rendered, made and entered herein on December 20th, 1935, denying the

petition for a writ of habeas corpus filed herein.

Dated this 2nd day of January, 1936.

JOSEPH P. FALLON

Attorney for Appellant.

[Endorsed]: Filed Jan. 2, 1936. [31]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now Thaman Singh, the petitioner in the above-entitled matter, through his attorney, Joseph P. Fallon, Esq., and respectfully shows:

That on the 20th day of December, 1935, the above-entitled Court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, the appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit thereof, for the correction of the errors as [32] complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the

Ninth Circuit thereof, and further, that the said appellant be held within the jurisdiction of this Court during the pendency of the appeal herein, so that he may be produced in execution of whatever judgment may be finally entered herein; and further, that the appellant be released on bail in the sum of Two Thousand ($2000.00) Dollars, pending the determination of said appeal.

Dated at San Francisco, California, January 2nd, 1936.

JOSEPH P. FALLON,
Attorney for Appellant.

[Endorsed]: Filed Jan. 2, 1936. [33]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes the appellant, Thaman Singh, through his attorney, Joseph P. Fallon, Esq., and sets forth the errors he claims the above-entitled Court committed in denying his Petition for a Writ of Habeas Corpus, as follows:

I.

That the Court erred in not granting the writ of habeas corpus and discharging the appellant, Thaman Singh, from the custody and control of Edward L. Haff, District Director of Immigration and Naturalization for the port of San Francisco.

II.

That the Court erred in not holding that it had jurisdiction to issue the writ of habeas corpus as prayed for in the petition on file herein. [34]

III.

That the Court erred in not holding that the allegation set forth in the petition for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus.

IV.

That the Court erred in holding that there was substantial evidence before the Immigration authorities to justify the conclusion that the appellant was unlawfully in the United States.

V.

That the Court erred in not holding that there was no substantial evidence before the Immigration authorities to justify the conclusion that the appellant was in the United States unlawfully.

VI.

That the Court erred in holding that the evidence submitted before the Immigration authorities was of sufficient weight and legality to warrant the conclusion that the appellant, after having once lawfully resided in the United States, departed therefrom, and therefore forfeited his right to remain therein.

VII.

That the Court erred in holding that the appellant was accorded a full and fair hearing before the Immigration authorities.

VIII.

That the Court erred in not holding that the appellant was not accorded a full and fair hearing before the Immigration authorities.

WHEREFORE, appellant prays that the said order and judgment of the United States District Court for the Northern District of California, made, given and entered herein in the office of the Clerk of said Court on the 20th day of December, 1935, denying the petition for a writ of habeas corpus, be reversed, and that he be restored to his liberty and go hence without day.

Dated at San Francisco, California, January 2nd, 1936.

JOSEPH P. FALLON,
Attorney for Appellant.

[Endorsed]: Filed Jan. 2, 1936. [35]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

It appearing to the above-entitled Court that Thaman Singh, the petitioner herein, has this day filed and presented to the above Court his petition praying for an order of this Court allowing an

appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and order of this Court denying a writ of habeas corpus herein and dismissing his petition for said writ, and good cause appearing therefor.

IT IS HEREBY ORDERED that an appeal be and the same is hereby allowed as prayed for herein, upon the filing of a cost bond in the sum of Two Hundred Fifty ($250.00) Dollars; and

IT IS HEREBY FURTHER ORDERED that the Clerk of the above-entitled Court make and prepare a transcript of all the papers, proceedings and records in the above-entitled matter and transmit [36] the same to the United States Circuit Court of Appeals for the Ninth Circuit within the time allowed by law; and

IT IS FURTHER ORDERED that the execution of the warrant of deportation of said Thaman Singh be and the same is hereby stayed pending this appeal, and that the said Thaman Singh be not removed from the jurisdiction of this Court pending this appeal; and

IT IS FURTHER ORDERED that the appellant, Thaman Singh, be released from custody on bail in the sum of Two Thousand ($2000.00) Dollars.

Dated at San Francisco, California, January 2nd, 1936.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Jan. 2, 1936. [37]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the Court that the immigration records appertaining to the arrest of Thaman Singh, the detained herein, were introduced in evidence before and considered by the lower court in reaching its determination herein, and it appearing that said records are a necessary and proper exhibit for the determination of said case upon appeal to the Circuit Court of Appeals.

IT IS NOW THEREFORE ORDERED, upon motion of Joseph P. Fallon, Esq., attorney for the detained herein, that the said immigration records may be withdrawn from the office of the Clerk of this Court, and filed by the Clerk of this Court in the office of the Clerk of the United States Circuit Court of Appeals in and for the Ninth Judicial District, said withdrawal to be made at the time the record on appeal is certified to by the Clerk of this Court.

Dated at San Francisco, California, January 2nd, 1936.

MICHAEL J. ROCHE,
United States District Judge. [38]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of said Court:

Sir:

Please issue copies of following papers for transcript on appeal:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Respondent's return to Order to Show cause and excerpts of testimony.
4. Order Denying Petition for Writ of Habeas Corpus.
5. Notice of Appeal.
6. Petition for Appeal.
7. Assignment of Errors.
8. Order Allowing Appeal.
9. Order Transmitting Original Exhibits.
10. Citation on Appeal.
11. Praecipe.

JOSEPH P. FALLON,
Attorney for Appellant.

[Endorsed]: Filed Jan. 2, 1936. [39]

District Court of the United States, Northern District of California.

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, WALTER B. MALING, Clerk of the United States District Court, for the Northern District of

California, do hereby certify that the foregoing 39 pages, numbered from 1 to 39, inclusive, contain a full, true, and correct transcript of the records and proceedings in the Matter of THAMAN SINGH on Habeas Corpus, No. 22138-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Eight Dollars and Seventy-five Cents ($8.75) and that the said amount has been paid to me by the Attorney for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 10th day of January A. D. 1936.

[Seal] WALTER B. MALING,
Clerk.
By C. M. TAYLOR,
Deputy Clerk. [40]

CITATION ON APPEAL.

United States of America—ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To EDWARD L. HAFF, District Director of Immigration and Naturalization for the port of San Francisco, and H. H. McPIKE, United States Attorney for the Northern District of California, his attorney herein, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit

Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein THAMAN SINGH is appellant, and you are appellee, to show cause, if any there be, why the decree or judgment rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Michael J. Roche, United States District Judge for the Northern District of California, this 2nd day of January, A. D. 1936.

MICHAEL J. ROCHE,
United States District Judge.

Received copy of Citation on Appeal this 2nd January, 1935.

H. H. McPIKE,
U. S. Attorney.

[Endorsed]: Filed Jan 2, 1936. [41]

[Endorsed]: No. 8094. United States Circuit Court of Appeals for the Ninth Circuit. Thaman Singh, Appellant, vs. Edward L. Haff, District Director of Immigration, Naturalization for the port of San Francisco, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed January 10, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMAN SINGH,

Appellant,

vs.

EDWARD L. HAFF, District Director of Immigration and Naturalization for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

JOSEPH P. FALLON,
550 Montgomery Street, San Francisco, California,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 8094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMAN SINGH,

Appellant,

vs.

EDWARD L. HAFF, District Director of Immigration and Naturalization for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the lower court denying the petition for a writ of habeas corpus. Upon the hearing before the lower court the original records of the Immigration Service were introduced in evidence and marked Respondent's Exhibits "A" and "B", thus presenting the entire record before the court.

The alien, Thaman Singh, is a British subject, born in the province of Punjab, India. He has been ordered deported by the Secretary of Labor on the

grounds that he is in the United States in violation of the Immigration Act of 1924 in that: (1) At the time of entry he was not in possession of an immigration visa, and (2) he is an alien ineligible to citizenship and is not exempted by paragraph (c), Section 13 of said Act (8 U. S. C. A. Sec. 213 (a) and (c)), Respondent's Exhibit "A", pages 8, 9, 10, 11 and 12.

The sole issue involved in the case is the question of fact as to whether or not appellant last entered the United States prior to July 1, 1924 (the effective date of the Immigration Act of 1924, supra). If he entered this country on or after this date he is now subject to deportation under the provisions of said Act (8 U. S. C. A. Sec. 214). If, however, his last entry occurred prior to July 1, 1924, his deportation would be barred by the five-year limitation contained in the Immigration Act of 1917 (8 U. S. C. A. Sec. 155).

The alien claims to have arrived at the port of Seattle, Washington, February 29, 1912, on the S.S. "Minnesota", and was landed by immigration officials March 4, 1912, and that he has ever since remained in the United States. The alien was taken into custody by immigration officials at San Francisco on June 7, 1934, under Department warrant dated April 7, 1934. The application for the warrant of arrest was based on the ex parte statements of five Mexicans, who, through a photograph exhibited to them at Calexico, California, pretended to identify this alien as a person they had seen in Mexico subsequent to July 1, 1924.

It is conceded by the immigration officials that the alien was the person who entered the United States lawfully on the aforesaid date, but that subsequent thereto he left the United States and later on re-entered after July 1, 1924 (Respondent's Exhibit "A", p. 93).

SPECIFICATIONS OF ERROR.

First: That the court erred in holding that there was substantial evidence before the immigration authorities to justify the conclusion that the appellant was unlawfully in the United States.

Second: That the court erred in holding that the evidence submitted before the immigration authorities was of sufficient weight and legality to warrant the conclusion that the appellant, after having once lawfully resided in the United States, departed therefrom, and therefore forfeited his right to remain therein.

Third: That the court erred in holding that the appellant was accorded a full and fair hearing before the immigration authorities.

ARGUMENT.

The alien claims that he arrived at Seattle, Washington, on the S.S. "Minnesota" on February 29, 1912, and that he was landed by the immigration officers on March 4, 1912. The government has offered in evidence Exhibit "J", Form 505 (Respondent's Exhibit

"A", p. 115), in the name of Thaman Singh, who arrived at the port of Seattle on the S.S. "Minnesota" February 28, 1912. The alien claims this is his arrival record. He also presented two witnesses, Kushia Singh (Respondent's Exhibit "A", pp. 41 to 45), and Pakhar Gundo (Mehian Singh) (Respondent's Exhibit "A", pp. 45 to 52), who arrived on the same boat with him (the official records confirm such arrival), and these witnesses positively identify this alien as having arrived at that time. The examining inspector says (Respondent's Exhibit "A", p. 93):

> "It is reasonable to presume that this (arrival record, Exhibit J) does actually pertain to this alien. However, although it is believed that the alien actually did enter the United States as claimed in the year 1912, it is also believed that he did not remain in the United States for any length of time."

It is our contention that where an alien has shown conclusively that he did legally enter the United States many years ago, and has positively and consistently testified that he has ever since remained in the United States, the burden of attack to show that he is now illegally here is on the government.

Wong Yee Toon v. Stump (C. C. A. 4th), 233 Fed. 194;

Ng Fung Ho et al. v. White (C. C. A. 9th), 266 Fed. 765;

U. S. v. Moy Nom, 249 Fed. 772;

Choy Yuen Chan v. U. S., 30 Fed. (2) 516;

In re Lum You, 262 Fed. 451;

In re Lee Hung Wong, 29 Fed. (2) 768.

The government has offered nothing except suspicion and conjecture based on illegal and incompetent documents. It appears that the courts have uniformly held that there must be evidence, legal evidence, to support the charges contained in a warrant of arrest in deportation proceedings. Apparently a very large majority of the courts hold that there must be substantial evidence in a proceeding of this kind, and that whether there is any substantial evidence presented in support of the charge in deportation proceedings is a question of law reviewable by the courts.

Backus v. Owe Sam Goon, 235 Fed. 847;
Lisotta v. U. S., 3 Fed. (2) 108;
Mantler v. Commissioner of Immigration, 3 Fed. (2) 234;
Svarney v. U. S., 7 Fed. (2) 515 (C. C. A. 8th); and
8 U. S. C. A., pages 240 to 242, note 168.

The examining inspector (Respondent's Exhibit "A", p. 93) expresses the opinion that this alien left the United States a few years after his arrival and resided a number of years in Mexico. There is no basis for this opinion except the ex parte statements of five Mexicans who, through a photograph exhibited to them at Calexico, California, alleged that the alien was a person they had seen in Mexico subsequent to July 1, 1924. The inclusion in the record of this case of the ex parte statements of these five Mexicans constituted an unfair hearing. These statements were taken by an immigration inspector prior to the alien's arrest; the alien was not present at the time the statements were taken; he was not represented by counsel

or otherwise at the time; said witnesses were not produced by the government for cross-examination, and the alien's attorney had no opportunity to cross-examine them. The only offer on behalf of the government to present these witnesses for cross-examination was at Calexico, California, nearly 500 miles away from the alien's place of residence and where he was unable to appear with his attorney because of his financial condition (Respondent's Exhibit "A", pp. 82, 83, 85). It was therefore moved, for the reasons set forth, that the ex parte statements of the Mexican witnesses be suppressed and stricken from the record and completely eliminated from any consideration as evidence in the case.

In the case of *Ungar v. Seaman,* 4 Fed. (2) 80 (C. C. A. 8th), where certain ex parte statements had been incorporated in the record, the court said:

> "The introduction in evidence against the accused of the reports and affidavits of the officers who conducted these secret examinations of the contents of these unfair and unjust examinations violated the indispensible requirements of a fair trial, that the witnesses against the accused shall confront them and give the latter an opportunity to cross-examine them, and that hearsay is neither competent nor fair evidence against the accused."

In the case of *Svarney v. U. S.,* supra, the court said:

> "Deportation proceedings are in their nature civil. The rules of evidence need not be followed with the same strictness as in the courts. * * *
>
> However, even in such administrative proceedings, fundamental and essential rules of evidence

and of procedure must be observed. * * * But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information as could jurors in primitive days.

All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. * * *

The right of cross-examination has long been firmly established in English-speaking countries. * * * Cross-examination is the right of the party against whom the witness is called, and the right is a valuable one as a means of separating hearsay from knowledge, error from truth, opinion from fact, and inference from recollection, * * * This court has in numerous cases and in various classes of litigation been insistent that such right should not be infringed. * * * But a fair and full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, and not the mere privilege, of the party against whom he is called, and a denial of this right is a prejudicial and fatal error" (see cases cited).

In the case of *Bunji Une,* 41 Fed. (2) 239, the court said:

"Admittedly the examination of four Japanese witnesses was had in the absence of both petitioner and his counsel and without notice to either. * * * Furthermore, identification of petitioner was made by photograph. This, in the judg-

ment of the court, is a questionable proceeding, open to uncertainties, and does not rise to the standard of due process of law to which the petitioner, as well as all other inhabitants of the United States, is entitled, and the court is forced to the conclusion that the proceedings on which the order of deportation is based were unfair within the meaning of the law governing them" (see cases cited).

See also the case of *Gonzales v. Zurbrick,* 45 Fed. (2) 934 (C. C. A. 6th).

The statements of these five witnesses are quite fantastical. Three of them knew no name for the alien and the other two did not know him by the name by which the alien says he has always been known. It is shown that there were many East Indians, one thousand or more, in the locality in which these witnesses resided. They were shown a recent photograph of the present alien and pretended to identify it as that of a person they had last seen in Mexico some four or five years ago, notwithstanding the numerous East Indians they had seen during the period of time they claimed this alien was in Mexico and since, and the inevitable changes in features, appearance and dress during this lapse of time. Such identifications have been repeatedly held as insufficient evidence to warrant an order of deportation.

Yee Et (Ep) v. U. S., 222 Fed. 66;
Backus v. Owe Sam Goon, 235 Fed. 847;
White v. Tom Yuen, 244 Fed. 739;
Ex parte Bunji Une, 41 Fed. (2) 239;

Lee Mea Yong, U. S. District Court, Northern District of California, No. 18,161, discharged by court on habeas corpus proceedings on ground that photographic identification was not sufficient.

Counsel for the alien on the grounds and under the decisions hereinbefore set forth, also moved to strike out and suppress the following ex parte statements based on photographic identification, and where the witnesses were not presented for cross-examination, viz.: statement of Pedro Gonzales taken at Westley, California, June 28, 1934, Government Exhibit "N" (Respondent's Exhibit "A", p. 119); statement of Manuel Velasco taken at Firebaugh, California, June 28, 1934, Government Exhibit "O" (Respondent's Exhibit "A", p. 122), and Government Exhibit "W" taken at Bridal Veil, Oregon, October 31, 1934 (Respondent's Exhibit "A", p. 134). Counsel also moved to strike out other documents, reports, certificates, letters, etc., which are not competent evidence in a proceeding of this kind, having been incorporated in the record in violation of the alien's rights and contrary to due process of law. It is apparent little or no attention was given to the alien's rights or what under the decision of the courts constitutes a fair hearing, in the presentation of evidence on the hearing before the immigration inspectors.

The alien has repeatedly and consistently stated that he first arrived in this country at Seattle, Washington, February 29, 1912, and that he was landed at said port March 4, 1912, and has ever since remained in the

United States. He gave a reasonably complete history of his movements in this country from the time of his admission in 1912 up to the present time. There is no competent evidence to contradict him on any point. He testified he worked for a short time in Seattle and then went to Portland, Oregon, where he worked in different lumber mills in that locality, and as a farm hand, up until 1924, having made at least two trips to California in the meantime. In May or June, 1924, he started to work for the American Smelting and Refining Company at the Garfield, Utah, plant, and worked there until about June, 1925, and again returned to Oregon and worked in the lumber mills. In 1927 and 1929 he worked for a Hindu named Sarain Singh, who had a contract with the Bridal Veil Lumber Company near Portland and was engaged in piling lumber, loading it on cars, etc. This work lasted until about October or November, 1929, when the mills closed down. He went back to California but did very little work in 1930 due to the depression. Commencing in January or February, 1931, he worked on a ranch near Yuba City, California, owned by The National Bank of Fresno. In 1932 and up to the present time he worked on a ranch for Donald Wilson, near Fowler, California.

The examining inspector (Respondent's Exhibit "A", p. 93) expresses the opinion that the alien left the United States a few years after his arrival and resided a number of years in Mexico. There is no basis for this opinion except the ex parte statements hereinbefore mentioned and which are not competent evi-

dence in this case. Some of these Mexicans identified the photograph of the alien as that of Tomas Singh or Tomas Juan, but the alien says he was never known by any name other than Thaman Singh and that he was never in Mexico. In this connection the inspector presented in evidence two checks, one endorsed by Tomas Singh and the other by Tomas Juan. A comparison of these two signatures with that of the present alien, Exhibit "X" (Respondent's Exhibit "A", p. 138), shows conclusively that he did not endorse said checks. It will also be noted that there were at least two other Thaman Singhs who had been in this country, one of them going to Mexico about 1920 or 1921. The inspector makes the statement that a Thaman Singh fraudulently secured return permits (Exhibits "G", Respondent's Exhibit "A", p. 106, and "R", Respondent's Exhibit "A", p. 126), and he expresses the opinion that he did so with the knowledge and assistance of the present alien. There is not a particle of evidence to support his opinion. On the contrary, the present alien denies all knowledge of it and says that if he had known this other alien was using his record, "I would have stopped it" (Respondent's Exhibit "A", p. 50).

The inspector also refers (Respondent's Exhibit "A", p. 94) to some certificates and other documents in connection with the alien's employment with the American Smelting & Refining Company at its Garfield, Utah, plant. These documents, of course, are not competent evidence. They are ex parte and the persons who made them were not cross-examined by

the alien's attorney and he had no opportunity to do so.

Brader v. Zurbrick, 38 Fed. (2) 472;
Engel et al. v. Zurbrick, 51 Fed. (2) 632.

The alien claims that he worked for this company at its Garfield, Utah, plant from May or June, 1924, until June, 1925, and presented a letter signed by H. A. Romney, an official of the company showing that Thaman Singh started to work at that plant as a laborer June 11, 1924, and quit May 21, 1925 (Alien's Exhibit "H", Respondent's Exhibit "A", p. 113). It would seem that there must have been two Thaman Singhs who worked at this plant as the government presented a communication from the same company (Government Exhibit "S", Respondent's Exhibit "A", p. 127) showing that one Thaman Singh worked at this plant from May 6, 1925, to May 8, 1925, and from November 24, 1925 to December 14, 1925. It will be noted that the alien's testimony is in substantial agreement with Exhibit "H" (Respondent's Exhibit "A" p. 113) and it will also be noted that these two Thaman Singhs did not work for this company at one and the same time except for two or three days, May 6th to 8th, 1925.

The inspector (Respondent's Exhibit "A", p. 94) then proceeds to do some conjecturing about a signature furnished by this company as that of a person who worked for it. These documents and reports of inspectors are not competent evidence. Besides, the signature is not proved and the person who presented it was not cross-examined and there is no proof as to where he got the signature, or that the company did

not have other signatures, some of which may have been of the present alien.

The inspector then discusses at some length (Respondent's Exhibit "A", p. 94) an aerial photograph (Government Exhibit "Z", Respondent's Exhibit "B") and the failure of alien to identify the location. In view of all the facts the matter seems more than frivolous. There is no competent proof that this aerial photograph does represent the Garfield plant. The alien never saw this plant from the air and a view of the entire plant from the air doubtless appears quite different from seeing one side of it at a time from the ground. Besides, the alien has not seen this plant for about ten years and there may have been many changes in the meantime. In fact, there may have been so many changes that the alien might not recognize the place if he were to return there.

The inspector (Respondent's Exhibit "A", p. 95) says that no record could be found of the alien's employment at the Bridal Veil Lumber Company nor could any one be found who could identify his photograph. These reports and certificates are not competent evidence, and the persons who made them were not cross-examined.

Brader v. Zurbrick, supra, and
Engel v. Zurbrick, supra.

It is not likely that there would be any record of this alien's employment on the books of the company as he did not work for the company but for Sarain Singh, who had a contract with this company and who paid the alien. Sarain Singh's name was found in the company's records. As to the failure of any one to iden-

tify the photograph of the alien, there does not appear to be but one person now employed by the company who was there at the time this alien worked at said place, and the indications are that this man was somewhat irrational.

The alien was an itinerant laborer from the time of his admission until the year 1932, when he secured a job with Donald Wilson, rancher, and his present employer, living near Fowler, California. The constant shifting of employment, due to the seasonal work that he followed, and the fact that the record thereof was invariably kept by Hindu bosses, makes proof on his part of continuous residence extremely difficult. However, the fact that he was lawfully residing in the United States, makes the claim that he left voluntarily therefrom preposterous, for the reason that no alien, once within the portals of this promised land, ever leaves the United States without the legal right to return thereto having been first obtained from the proper authorities.

It is respectfully submitted that the judgment of the lower court should be reversed, with directions to issue the writ as prayed for, either for a trial upon the merits before the lower court, or to discharge the appellant from custody.

Dated, San Francisco, California,
April 1, 1936.

Respectfully submitted,
JOSEPH P. FALLON,
Attorney for Appellant.

No. 8094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMAN SINGH,

Appellant,

vs.

EDWARD L. HAFF, District Director of Immigration and Naturalization for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

H. H. MCPIKE,
United States Attorney,
ROBERT L. MCWILLIAMS,
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Post Office Building, San Francisco,
Attorneys for Appellee.

ARTHUR J. PHELAN,
United States Immigration and Naturalization Service,
Post Office Building, San Francisco,
On the Brief.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 8094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THAMAN SINGH,

Appellant,

vs.

EDWARD L. HAFF, District Director of Immigration and Naturalization for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

Fundamentally this appeal from an order (T. 51) denying a petition for a writ of habeas corpus involves the same points which this Court passed upon in *Kishan Singh v. District Director of Immigration,* No. 8078, decided April 20, 1936.

FACTS OF THE CASE.

Appellant, an East Indian alien, is held for deportation (Ex. A, p. 7) under the Immigration Act approved May 26, 1924 (8 U. S. C. A., Sections 213 (a), 213 (c), 214).

Appellant's claim is that he has been continuously within the United States since 1912, and hence that the 1924 statute is inapplicable. In their preliminary investigation leading up to the institution of the deportation proceedings, the immigration authorities obtained sworn statements from five residents of the vicinity of Mexicali, Mexico, who testified that appellant lived and worked in that vicinity for several years immediately prior to 1931 (T. 30-38). Two of these witnesses were able to recall appellant by the name "Tomas Singh" (T. 32, 33). One of them states: "Tomasito (diminutive of Tomas) was a very good friend of mine, but I have told you that I would tell the truth, so I must tell you that he was here in Mexico" (T. 32). Three of them recalled that he associated principally with Mexicans while there, rather than with his own countrymen (T. 32, 33, 35). Two of these witnesses placed him at the Shank No. 1 Ranch of the Colorado River Land Company there (T. 32, 35). Subsequent investigation resulted in two former foremen of that company being found and interviewed. One of the latter testified that appellant worked for that company in Mexico under his immediate supervision for about a year in 1926 and 1927 (T. 43-44). The other testified that during 1927 and 1928 appellant worked intermittently under his direct supervision for about a year for the same company in Mexico (T. 45-46). Both these latter witnesses also recalled that appellant was known in Mexico as Tomas Singh or Tomas Juan (T. 43, 45). Both have subsequently seen appellant in the United States and both refer to him as having been located at the Wil-

son Ranch near Fowler, California, in 1933 (T. 45, 46). Although appellant denies that he knows these witnesses, he admits that he has been employed at the Wilson Ranch near Fowler, California, since 1932 (T. 48).

Appellant presented two East Indian witnesses who simply testified that he came to the United States from India with them on the SS. "Minnesota" in February, 1912, but neither of these persons saw appellant between 1912 and 1931, and neither knows whether or not he was in the United States during that time (T. 48-50).

Appellant presented a letter (Ex. A, p. 107) and an affidavit (Id. p. 111) signed by an employee of the American Smelting and Refinery Company at Garfield, Utah, certifying as to his alleged employment by that company during 1924 and 1925. Even if it were shown that appellant is the person referred to therein, it would not tend to controvert the testimony of the government witnesses regarding his presence in Mexico *from 1926 to 1931.* The letter states that "*Tharman* Singh started to work here as a laborer 6-11-24 and quit 5-21-25" (Ex. A, p. 107), while the affidavit states that *Thaman* Singh, worked for the company from May 6, 1925, to May 8, 1925, and from November 24, 1925, to December 14, 1925 (Id. p. 111). Counsel suggests that these documents refer to the employment of two different men. However, appellant presented both documents (T. 13-17), and although he claims to have worked for that company during the period of one year mentioned in the letter

(T. 13), he claimed to recognize as his own signature the signature (Ex. A, p. 113) of the person Thaman Singh mentioned in the affidavit (T. 19-20). Clearly the latter document cannot refer to appellant, because it shows the subject's employment by the company to have aggregated only 23 days, and neither appellant's description, marital status nor place of birth corresponds to the facts shown by the company's record regarding that employee (T. 11, 14-15, 16). Another East Indian who applied for a reentry permit in 1928, claiming the same original entry into the United States in February, 1912, as that claimed by appellant, corresponds with the record of the American Smelting and Refinery Company in all details (T. 18). Appellant admits knowing that person (T. 18-19), but denies knowledge of the latter having claimed the 1912 arrival record which he claims (Ex. A, pp. 49-50).

Regarding the period in which the government witnesses place him in Mexico, appellant claims that he was in fact working for the Bridal Veil Lumber Company (also referred to in the record as "Bradeville" Lumber Company) in Oregon, from 1926 to 1929 (T. 25, 29), and came to California in 1930, but "didn't work any place—just bumming around" (T. 25). However, the employment records of the Bridal Veil Lumber Company for the years 1925 to 1930 do not contain appellant's name (T. 26), and the foreman of the East Indians who were employed by that company during that period, testified that no such person had ever worked for the company (T. 27-28).

ARGUMENT.

Appellant argues that the burden of proof is on the government here, because he has shown that he did enter the United States legally in 1912. However, the 1912 entry is not in dispute. The government produced testimony of seven persons showing that during the period from 1926 to 1931 appellant was in Mexico. He makes no claim of subsequent lawful entry into the United States, but simply denies that he was out of the United States at all during that period. The 1912 entry can avail him nothing in the face of the evidence of his presence in Mexico after the 1924 Immigration Act went into effect.

In

Wong Back Sue v. Connell, 233 F. 659, 664,

this Court said, relative to an identical situation:

> "But the sworn statements of witnesses attached to the record filed by the petitioner clearly show that the alien was seen in Mexico shortly before he was found in the United States. The certificate of residence held by the alien became of no avail to him after he left the United States without procuring a return certificate."

In the similar case of

Bun Chew v. Connell, 233 F. 220, 221,

this Court said regarding the same contention:

> "The answer to this is that by the evidence it was shown that appellant had left the United States and had gone to Mexico, and that he was there as late as April 1, 1912, and he produced no evidence that in re-entering the United States he complied with the law and did not make a fraudulent entry."

See also:

8 *U. S. C. A.* Sec 221;

U. S. ex rel. Orisi v. Marshall (C. C. A. 3), 46 F. (2d) 853, 854;

Kjar v. Doak (C. C. A. 7), 61 F. (2d) 566, 569, 570.

In the cases cited at page 4 of appellant's brief the deportation was sought upon the theory that, although the alien was regularly admitted, such admission had been obtained by fraud. None of those cases involved any issue as to the fact of absence or reentry.

The testimony (hereinabove outlined) of the seven witnesses as to appellant's presence in Mexico between 1926 and 1931 is positive, detailed and convincing. Four of them place him at the same project there, and two of the latter not only have seen him subsequently in the United States, but connect him with the Wilson Ranch near Fowler, California (where appellant admits he is employed).

Appellant contends that the introduction of the statements taken from the Mexican witnesses prior to the application for the warrant of arrest rendered the hearing unfair, and that he was afforded no proper opportunity to cross-examine those witnesses.

This contention is ruled adversely by the recent decision of this Court in the case of

Kishan Singh v. Cahill, No. 8078, supra,

and the authorities therein cited. In the case at bar

the same offer was made to produce these government witnesses for cross-examination at Calexico, California (the point nearest their place of residence), as was made in the *Kishan Singh* case (T. 41-42).

Appellant argues that identifications by photograph are insufficient. This same contention was made by appellant in the *Kishan Singh* case, supra. Identifications are frequently made in this manner, both in judicial proceedings (*Wigmore on Evidence,* Sec. 660; *Wilson v. U. S.,* 162 U. S. 613, 621, 16 S. Ct. 895, 899, 40 L. Ed. 1090, 1096), and in these administrative deportation proceedings (*Kamiyama v. Carr* (C. C. A. 9), 44 F. (2d) 503, 504; *Wong Back Sue v. Connell,* supra). The contention goes only to the weight of the testimony, and all such questions, of course, are for the Department.

In *Yee Et v. U. S.,* 222 F. 66, cited by appellant, the proceedings were *judicial* and the deportation orders were affirmed, although the Court remarked that certain witnesses who resided in the same city in which the hearing was held before the United States Commissioner were not produced at the hearing.

In *Backus v. Owe Sam Goon,* 235 F. 847, which appellant cites, the transfer of jurisdiction from the judiciary under the Chinese Exclusion Act to the executive under the Immigration Act of 1907, rested entirely upon the statement of one witness that he had seen the appellee a number of times in a laundry in Mexico, and no opportunity was given to cross-

examine this witness at any time or place. The same situation existed in the case of *White v. Tom Yuen,* 244 F. 739, which appellant cites.

In *Ex parte Bunji Une,* 41 F. (2d) 239, also cited by appellant, there was no direct evidence that the alien had been outside the United States after July 1, 1924, except a date alleged to have been given by him prior to his arrest without the services of an interpreter, and no opportunity was afforded the alien to cross-examine the government witnesses at any time or place.

In the case of *Lee Mea Yong* (D. C. N. D. Cal.), unreported, the question was as to the sufficiency of statements of persons interviewed in China to establish that the applicant had lost her American citizenship through marriage to an alien.

Appellant also complains of the introduction in evidence of the statements taken from the witnesses Gonzales and Velasco (T. 43-46), and the report of the investigation and statement of the foreman at the Bridal Veil Lumber Company (T. 25-28).

No objection was made at the hearing by appellant's counsel to the introduction of these documents (T. 28-29, 47), nor was any request made that these persons be produced for cross-examination. Request for opportunity to cross-examine government witnesses was made only as to the Mexican witnesses, who gave statements at Calexico, California (Ex. A, pp. 82-83 and 85-86). If appellant's counsel had in-

dicated any desire at any time in the course of the hearings (which extended over nine months), to cross-examine any of these other witnesses, undoubtedly the same opportunity would have been afforded to cross-examine them at the points nearest their places of residence as was offered with reference to the five Calexico witnesses.

It has been repeatedly held that failure to object at the hearing to the introduction of such statements, or to request the production for cross-examination of the persons making them, constitutes a waiver.

Ng Kai Ben v. Weedin (C. C. A. 9), 44 F. (2d) 315, 317;

Imazo Itow, et al., v. Nagle (C. C. A. 9), 24 F. (2d) 526, 527;

U. S. ex rel Diamond v. Uhl (C. C. A. 2), 266 F. 34, 40.

Appellant states in his brief that a comparison of the signatures upon the checks endorsed in the names of Tomas Singh, and Tomas Juan (Ex. A, p. 138), with appellant's signature "shows conclusively that he did not endorse said checks". This point, however, has been decided against him by the Secretary of Labor (Ex. A, p. 10), who found that the signature on the check compares much more favorably with appellant's signature than does the signature from the records of the American Smelting and Refinery Company, which appellant claims to be his.

Appellant also refers to certain documents in connection with his alleged employment with the latter

company as being incompetent and introduced without opportunity to cross-examine the persons making them. As pointed out in our statement of facts, the letter and the affidavit certifying to the employment record of that company were produced by appellant himself, and mention is made in said affidavit of the fact that the signature on their record had been sent to the immigration authorities. We see nothing else from that company except the letter transmitting said signature (Ex. A, p. 113), and a letter (Id. p. 127) which contains practically the same information as is contained in the affidavit (Id. p. 111) which appellant presented. There is also in the record a report (Id. pp. 132, 133) submitted by an inspector who called at the plant and examined the original of the employment record set forth in the affidavit which appellant himself presented. No objection was made at the hearing to the introduction of any of this matter relative to his alleged employment at the American Smelting and Refinery Company, nor was there any request made for opportunity for cross-examination (Id. pp. 54-66, 76-77). We fail to see any unfairness in this regard, nor can we reconcile appellant's present contention that the signature and the aerial view of the plant were not properly proven with the fact that his own testimony at the hearing purported to identify both (T. 19-20, 22).

CONCLUSION.

We submit that the contentions of appellant are without merit, and that the order of the Court below was correct and should be affirmed.

Dated, San Francisco,
April 24, 1936.

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United States Attorney,
ROBERT L. McWILLIAMS,
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United States Immigration and
Naturalization Service,
On the Brief.

No. 8095

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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CITY OF COEUR D'ALENE, a municipal corporation; J. K. COE, Mayor; A. GRANTHAM, Treasurer; WILLIAM T. REED, Clerk; ALFRED SWANSON, JOHN FREDERICK, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, RICHARD WEEKS, S. H. McEUEN and J. H. POINTNER, Members of the City Council of said City of Coeur d'Alene; and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,

Appellants,

vs.

THE WASHINGTON WATER POWER COMPANY, a corporation,

Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Northern Division

BRIEF OF APPELLANTS, CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION, CITY OFFICERS AND MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO.

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STATEMENT OF THE CASE

This is an appeal from a decree made and entered on the 9th day of September, A. D., 1935, by the United States District Court for the District of Idaho, Northern Division, enjoining appellants (defendants in the Court below) from consummating a loan and grant from the Federal Emergency Administration of Public Works to the City of Coeur d'Alene, Idaho, for the construction of a municipal electric power generating plant and distribution system in said City, under the provisions of Sections 201, 202 and 203 of Title II of The National Industrial Recovery Act (Sections 401, 402 and 403, Title 40, U. S. Code).

Said decree permanently enjoined the defendants, City of Coeur d'Alene, a municipal corporation, and the Officers and Members of the City Council of said City from making or entering into, or consummating any contract with the Federal Emergency Adminstration of Public works, or with the United States of America, for the purpose of providing for, or in furtherance of the construction of a municipal electric power generating plant and distribution system in the City of Coeur d'Alene; and from financing or attempting to finance any such municipal electric generating plant or distribution system in the City of Coeur d'Alene with funds received from the Federal Emergency Administration of Public Works, or from the United States, whether in the form of loans or gifts or grants; and from issuing, pledging, delivering or selling to the Federal Emergency Administration of Public Works, or the United States of America, any bonds of the City issued under Ordinance No. 713, referred to in the Complaint (which Ordinance provided for the issuance of bonds and for submission of the incurring of the indebtedness to the voters); and from accepting, using or applying any moneys, the proceeds of any such loan or gift or grant from the Federal Emergency Administration of Public Works, or from the United States of America, and from proceeding with the issuing, pledging, selling or delivering any bonds of said City to the Federal Emergency Administration of Public Works, or to the United States of America.

Said decree permanently enjoined the Defendant, Harold L. Ickes, as Federal Emergency Administrator of

Public Works from loaning or giving or granting to the City of Coeur d'Alene, any public moneys of the United States to be used in the construction of a municipal electric plant for the generation and distribution of electricity within said City, and from entering into any contract with the said City or its officers, to purchase any municipal bonds referred to in the Complaint, or provided for by said Ordinance No. 713, or from making any loan, gift or grant of moneys of the United States of America to said City for the purpose of the construction or assisting in the construction of a municipal electric power generating or distribution system.

The practical effect of the decree was to enjoin the City of Coeur d'Alene on the one hand and the Federal Emergency Administrator of Public Works on the other from carrying out the terms of the loan and grant agreement which had been executed by the City and was about to be executed by the Federal Emergency Administrator of Public Works when the temporary injunction was issued in this case. Said loan and grant agreement is attached to the Amended Bill of Complaint marked, "Exhibit D", and is set forth in the Transcript of the Record at pages 104 to 134 inclusive. Its terms and provisions are as follows:

Part one provides that subject to the terms and conditions stated, the Government will by loan and grant not exceeding in the aggregate, the sum of $650,000, aid the City of Coeur d'Alene in financing the project consisting substantially of the construction of a water sys-

tem including sinking wells, installing pumps, and a distributing system for water service; also a Diesel engine generating plant and an electric distribution system, all pursuant to the City's application, Title II of The National Industrial Recovery Act, and the Constitution and statutes of the State of Idaho.

The financing is by means of a loan (through the sale of bonds to the Government) and a grant. The City agrees to sell and the Government agrees to buy in the principal amount thereof plus accrued interest $504,000 of the bonds to be issued by the City bearing interest at the rate of 4% per annum payable semi-annually from date until maturity, less such amount of the bonds, if any, as the City may sell to purchasers other than the Government.

The Government will make and the City will accept, whether or not any or all of the bonds are sold to other purchasers, a grant in an amount equal to 30 percentum of the cost of labor and materials employed upon the project. If all of the bonds are sold to purchasers other than the Government, the Government will make the entire grant by payment of money. In no event shall the grant be in excess of $175,000.

The City is required to deposit the proceeds of the sale of bonds and the grant in construction accounts, and to apply them solely toward the cost of construction of the project, or to the extinguishment of the bonds or interest. The City is required to commence the construction of the project upon receipt of the first bond payment, and

continue it to completion with all practicable dispatch in an efficient and economical manner at a reasonable cost and in accordance with the provisions of the agreement, plans, drawings, specifications and construction contracts which shall be satisfactory to the Administrator and under such engineering, supervision and inspection as the Administrator may require.

The Government shall be under no obligations to pay for any of the bonds or to make any grant if the Administrator shall not be satisfied that the City will be able to complete the project for the sum of $650,000, or that the City will be able to obtain in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the project.

The Government is not required to purchase any bonds unless the City adopts a rate and bond ordinance satisfactory to the Administrator in form, sufficiency and substance, such ordinance to provide among other things that no donations, taxes, depreciation charges or any other items of expense except normal operating expenses and maintenance, together with water, lighting and power line extensions shall be charged against the revenues of the project, and that all municipally used water and electrical energy shall be paid for at current selling rate schedules, except water used in fighting fires, and a reasonable rate shall be paid for hydrant rental, all such payments to be made as the service accrues, from the general funds of the City into the funds of the City's

water and electrical Departments.

The City covenants that at such time as electrical energy shall be made available from the Government power project at Grand Coulee, State of Washington, at rates such that the costs thereof to the City shall be less than the cost thereof delivered from the Diesel engine generating plant to be constructed as a part of the project, the City will thereupon and thereafter cease active operation of such Diesel engine power plant and place it on a standby basis only, and will purchase all of its electrical energy requirements from the said Governmental power project at Grand Coulee, Washington. This covenant is made a material consideration for the execution of the agreement on behalf of the Government and for the loan and grant to be made thereunder.

Part two relates to construction work, wages and hours of labor, and in consideration of the grant, the City covenants that all work on the project shall be subject to the rules adopted by the Administrator to carry out the purposes and control the administration of the act. Convict labor is prohibited and no materials manufactured or produced by convict labor shall be used on the project. The thirty hour week is established as the basis of employment with just and reasonable wages sufficient to provide a standard of living in decency and comfort, and in no event, to be less than the minimum wages prescribed by the Administrator, in the zone or zones in which the work is to be done. The maximum of human labor shall be used in lieu of machinery wherever

practicable and consistent with sound economy and public advantage. All construction work on the project shall be done under contract, provided, however, that the prices in the bids are not excessive. The City reserves the right to apply to the Administrator for permission to do all or any part of the project on a force account basis.

The agreement shall be governed by and be construed in accordance with the laws of the state.

The validity of the loan and grant to be made pursuant to the provisions of the loan and grant agreement was challenged by the appellee as plaintiff in the Court below, by its amended Bill of Complaint on several grounds most of which were sustained by the findings of the lower Court in its Findings of Fact and Conclusions of Law. The decree is based upon these findings which in legal effect substantially are as follows:

First. That appellee will suffer a direct injury from the making of the loan and grant and the construction of a competing municipal electric plant in the City of Coeur d'Alene, and is entitled to challenge the constitutionality of Title II of The National Recovery Act. (R. p. 258-261).

Second. That Congress has no power to make the loan and grant of public moneys of the United States to the City of Coeur d'Alene for the purpose of constructing a local municipal electric plant in the exercise of the general taxing power of the United States because:

(a) Article I Section 8 Clause 1 of the Constitution

of the United States does not authorize Congress to levy taxes or appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government.

(b) That power to tax and appropriate public moneys of the United States must be restricted to objects which are national, general and Federal in character, and not mere matters of local benefit.

(c) The proposed construction of a local generating plant and distribution system in the City of Coeur d'Alene is not for any public use or object affecting the general welfare of the United States. (R. p. 258-259).

Third. That the loan and grant is unauthorized, unlawful and in violation of the Tenth Amendment to the Constitution of the United States. (R.p.260).

Fourth. That the expenditures contemplated and proposed by the city constitute the incurring of an indebtedness or liability in violation of Article 8, Section 3 of the Constitution of the State of Idaho. (R.p.260-261).

Fifth. That the use of public funds in the construction of a competing electric generating plant and distribution system within the City of Coeur d'Alene as proposed, will result in irreparable damage to the appellee, and will amount to the taking of its property without due process of law in violation of the Fifth Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States.

Sixth. That the conditions attached to the making of the loan and grant and the basis of selection for making the same violate the Tenth Amendment to the Constitution of the United States.

Seventh. That the city did not provide service to a large area within the City of Coeur d'Alene although the ordinance submitting the question of the authorization of the bond issue and the application to the Federal Emergency Administration of Public Works, contemplated an electric plant and distribution system adequate and so constructed as to serve all sections of the city, and said Administration required as a condition to the making of any loan or grant, that the system to be constructed should be adequate to serve and should serve all sections of the city (R.p.249).

Eighth. That the plant to be constructed with the funds obtained from the loan and grant is not adequate to care for the load in said city; the cost of an adequate plant and an adequate distribution system would exceed the amount of the funds provided. (R.p.250-251).

The Court admitted evidence with respect to the adequacy of the plant and distribution system proposed to be constructed by the City and with respect to the cost of installing an adequate Diesel engine electric generating plant and distribution system, to which evidence the appellants objected on the ground that it was an attempt to interfere with the administrative functions of the executive departments of the Government.

The witness, Lester R. Gamble, testifying for appellee, was permitted to testify that the cost of extending the distribution system into a certain area of the City which was left out as shown on the map attached to the original application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works for a loan and grant, admitted in evidence as "Plaintiff's Exhibit 1" including overhead and contractor's profit is $27,534. (R.p.280).

The same witness was permitted to answer the following question:

"Q. What did you find with respect to whether or not the city residences could be served by services provided for it?"

The appellants objected to this question on the ground that it is immaterial and an attempt to interfere with the administrative discretion of the executive department, and that the question of the capacity and sufficiency of the proposed plant is left to the discretion, in the first instance, of the City that is going to build it, and under the proposed arrangement, to the Federal Emergency Administration of Public Works. This objection was over-ruled to which ruling the appellants excepted, and their exception was allowed and the witness was then permitted to testify with respect to the details of the distribution system required in the City of Coeur d'Alene as compared with the system provided in the application of the City for a loan and grant. The answer of the witness is in such detail that it is impracticable

to set it out in full, but it appears at Pages 280, 281 and 282 of the Record.

The witness, Lee Schnietter testifying for appellee, was permitted to testify that an adequate Diesel engine generating plant would cost the sum of $368,790, based on 100% of the load, and $297,200 to serve 80% of the load as shown by his testimony (R.p.367), by his tabulation marked "Plaintiff's Exhibit No. 49", (R.p.527-528), which he testified was an estimate of the cost of installing a reasonably operative Diesel engine plant to generate power for the 80% load and the 100% load. (R.p.363).

The appellants had objected to the introduction of any evidence respecting the costs of construction and it was agreed in open Court that the objection as to the immateriality of all evidence going to the cost of construction of the plant should go to all such testimony. (R. p. 361-362).

The figures used by this witness in making his estimate of the costs of the plant were based on prices in November 1934. (R.p. 375).

The witness, Lester R. Gamble, testifying for appellee was permitted to testify that the cost to construct a distribution system such as he had described and had testified was necessary in the City at this time to serve 100% of the consumers would be $195,005, which costs were based on prices in November 1934. (R.p. 285).

The engineer's report contained in the application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works for a loan and grant,

"Plaintiff's Exhibit No. 1", was a preliminary plan and was not prepared as a final plan and detailed specifications.

The witness, Ernest E. Porter, testifying for appellants testified that he was working directly under the supervision of Mr. Wood (the City's engineer) in designing the electrical distribution system in the City of Coeur d'Alene, and was in direct supervision of the distribution and street lighting system in the preparation of that report. He then testified:

"This report was prepared to accompany the application for the loan and grant and for the use of the Public Works Administration, and to give the Public Works Administration a clear understanding of what would be required in the way of labor, and a general plan of distributing electricity to the consumers of the City of Coeur d'-Alene. It was a preliminary plan, a skeleton plan only, and was not prepared as a final plan and detailed specifications. (R.p.390-391).

The witness, Paul W. Dexheimer, testfying for appellants, testified as follows:

"The purpose of the engineer's report was prepared solely for use with this application. It is customary to use that form of engineer's report or estimate. It was not prepared as the final plan or detailed specifications of the project. (R.p.415).

"The proceeding for the construction of an electrical plant in Coeur d'Alene has not reached the stage for the

preparing of the final plans and detailed specifications. The plans and cost estimates provided in the engineering report attached to the application, "Plaintiff's Exhibit 1" are not sufficient from an engineering standpoint, for the calling for bids for construction. The plans and specifications are so sketchy in detail that I don't think any contractor would dare to take the risk of making a bid on them. They would be insufficient for him to understand what was to be done, and do not provide any details." (R.p.416).

Prices were lower in 1933 when the engineer's report attached to the application of the City of Coeur d'Alene to the Federal Emergency Administration of Public Works was prepared by Mr. Wood, than they were in November 1934. (R.p.377), Mr. Wood's figures were based on prices in 1933 while appellee's cost estimates were based on prices in November 1934, after the N.R.A. Code was in effect. Prices were increased after the Code went in effect. (R.p. 375).

A statement issued by the Federal Emergency Administration of Public Works, known as Release No. 989 contains the following:

> "Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes."
>
> * * * * * * * *
>
> "However, we make it a practice before approv-

ing the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating." (R.p. 54-55).

In a letter to the Mayor of Coeur d'Alene, the Federal Emergency Administration of Public Works stated in effect that the rate ordinance required as a condition of the loan should fix rates approximately 20% below existing rates and should provide that such rates will be made available by the municipal plant, and will not be increased until certain conditions are proved to the satisfaction of the Administrator. (R.p. 67-68).

The acquisition of the water system is not involved in this case. (R.p. 29).

SPECIFICATION OF ERRORS

Appellants specify the following particulars in which the decree is erroneous and wherein the Court erred in entering the decree, to-wit:

1. The decree is contrary to law.

2. The Court erred in finding and deciding that appellee will suffer a direct injury from the making of the loan and grant to the City of Coeur d'Alene by the United States, and the construction of a competing municipal electric plant in the City of Coeur d'Alene, and is entitled to challenge the constitutionality of Title II of the National Industrial Recovery Act.

3. The Court erred in finding and deciding that Congress has no power to make the loan of public moneys

of the United States to the City of Coeur d'Alene, for the purpose of constructing a local municipal electric plant in the exercise of the general taxing power of the United States.

4. The Court erred in finding and deciding that Article I Section 8 Clause 1 of the Constitution of the United States does not authorize Congress to levy taxes or appropriate moneys for objects not within the enumerated powers expressly delegated to the Federal Government.

5. The Court erred in finding and deciding that the power of Congress to tax and appropriate public money of the United States must be restricted to purposes which were national, general and Federal in character, and not mere matters of local benefit.

6. The Court erred in finding and holding that the proposed construction of a local generating plant and distribution system in the City of Coeur d'Alene is not for any public use or object affecting the general welfare of the United States.

7. The Court erred in finding and deciding that the loan and grant is unauthorized, unlawful and in violation of the Tenth Amendment to the Constitution of the United States.

8. The Court erred in finding and deciding that the expenditures contemplated and proposed by the City constitute the incurring of an indebtedness or liability in violation of Article 8, Section 3 of the Constitution of the State of Idaho.

9. The Court erred in finding and deciding that the use of public funds in the construction of a competing electric generating plant and distribution system in the City of Coeur d'Alene as proposed will result in irreparable damage to the appellee, and will amount to the taking of its property without due process of law in violation of the Fifth Amendment and Section One of the Fourteenth Amendment to the Constitution of the United States.

10. The Court erred in finding and holding that the conditions attached to the making of the loan and grant and the basis of selection for making the same violate the Tenth Amendment to the Constitution of the United States.

11. The Court erred in finding and holding that the City did not provide service to a large area within the City of Coeur d'Alene; that the plant to be constructed with the funds obtained from the loan and grant is not adequate to care for the load in said city; and that the cost of an adequate plant and an adequate distribution system would exceed the funds provided therefor.

12. The Court erred in finding that an adequate Diesel engine generating plant for the service of the entire city would cost the sum of $368,790 computed as of November 1934, and to serve 80% of the load of said City would cost $297,200; that an adequate distribution system for said city would cost the sum of $195,005 as of the month of November 1934; and the total cost of installing an adequate Diesel electric generating plant and distribution system for the City of Coeur d'Alene serving 100% of

the consumers is the sum of $563,795, and to serve 80% of the load would cost $472,424.

13. The Court erred in admitting evidence with respect to the cost of extending the distribution system into the so-called omitted area over the objection of the appellants, and in permitting the witness, Lester R. Gamble, testifying on behalf of appellee to testify that "the cost of extending the distribution system into the area which was left out, marked in pink on the map, including overhead and contractor's profit is $27,534.

14. The Court erred in over-ruling the objection of appellants to the question propounded to the witness, Lester R. Gamble, testifying on behalf of appellee, "Q. What did you find with respect to whether or not the city residences could be served by services provided for it?", and in permitting said witness to testfy with respect to the details of the distribution system required in the City of Coeur d'Alene, as compared with the system provided in the application of the City for a loan and grant, "Plaintiff's Exhibit No. 1."

15. The Court erred in admitting evidence to the effect that an adequate Diesel engine generating plant would cost the sum of $368,790, computed as of November 1934, and to serve 80% of the load of said City would cost $597,200, and in over-ruling the objection of the appellants to the admission of such evidence, to which ruling appellants excepted.

16. The Court erred in admitting evidence to the

effect that an adequate distribution system for said City would cost the sum of $195,005, as of the month of November 1934, and in over-ruling the appellants' objection to such evidence, to which ruling the appellants excepted.

17. The Court erred in admitting any evidence with respect to the cost of a Diesel engine generating plant or the cost of a distribution system in the City of Coeur d'Alene, to which evidence the appellants objected on the ground that it was an attempt to interfere with the administrative functions of the executive departments of the Government, and in over-ruling such objection, to which ruling the appellants excepted.

18. The Court erred in finding that under the proposed contract between the City of Coeur d'Alene and the Federal Emergency Administration of Public Works, the City of Coeur d'Alene attempted to delegate to the Federal Emergency Administration of Public Works powers vested in it by the State of Idaho.

19. The Court erred in finding that the approval of the application of the City of Coeur d'Alene for the loan and grant was not for the purpose of relieving unemployment, and that the relief of unemployment will not be accomplished to any extent thereby, but that the purpose of said loan and grant is to enable the city to construct a competing plant or require the appellee to reduce its rates 20% lower than as fixed by the Public Utilities Commission of the State of Idaho, and that said loan and grant, if made, will be because of refusal or failure of appellee to accede to the demands of the Federal Emer-

gency Administrator of Public Works, to fix and regulate rates, charges and services of the appellee.

ARGUMENT

APPELLEE HAS NO STANDING TO QUESTION THE VALIDITY OF THE LOAN AND GRANT AGREEMENT OR THE CONSTITUTIONALITY OF TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT, BECAUSE IT WILL SUFFER NO DIRECT LEGAL INJURY.

It is a settled rule that before a party may challenge the constitutionality of an act of Congress, he must show that the act threatened thereunder will cause direct and legal injury and will adversely affect his legal rights.

In MASSACHUSETTS v. MELLON 262 U. S. 447, (FROTHINGHAM v. MELLON), in response to an attack upon the constitutionality of an act of Congress, the Supreme Court said:

> "The functions of government under our system are apportioned. To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts. The general rule is that neither department may invade the province of the other and neither may control, direct, or restrain the action of the other. * * * We have no power *per se* to review and annual acts of Congess on the ground that they are unconstitutional. *That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justifiable issue, is made to rest upon such an act.* Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which

otherwise would stand in the way of the enforcement of a legal right. *The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement,* and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

In the recent decision of the Supreme Court on the Agricultural Adjustment Act, it was held that the decision in Massachusetts v. Mellon, *supra,* did not prevent a taxpayer from attacking the constitutionality of the law, but in the opinion the Court said:

"That case might be an authority in the petitioners' favor if we were here concerned merely with a suit by a taxpayer to restrain the expenditure of the public moneys."

"It was there held that a taxpayer of the United States may not question expenditures from its treasury on the ground that the alleged unlawful diversion will deplete the public funds and thus increase the burden of future taxation. Obviously the asserted interest of a taxpayer in the federal government's funds and the supposed increase of the future burden of taxation are minute and undeterminable. But here the respondents who were called upon to pay money as taxes resist the exaction as a step in an unauthorized plan. This circumstance clearly distinguishes the case."

United States vs. Butler, ... *U. S.* ....., 80 Law Ed. Advance Opinions 287.

"It has been repeatedly held that one who would strike down a State statute as violative of the Federal Constitution must show that he is within the

> class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him. (Citing cases.) In no case has it been held that a different rule applies where the statute assailed is an act of Congress nor has any good reason been suggested why it should be so held."
>
> *Heald v. District of Columbia,* 259 U. S. 114
> *Fairchild v. Hughes* 258 U. S. 126.

The appellee contends, and the Court found that the construction of a competing municipal plant in the City of Coeur d'Alene will materially affect the value of the property of the appellee within the City, and the value of its franchise, and that the construction of said municipal plant will result in a direct and serious injury to the property and franchise of the appellee. (R.p. 257.)

This result could happen without the making of a loan and grant by the Federal Emergency Administration of Public Works, or any action of the United States or its officers. Appellee has no legal monopoly of the electric utility business in Coeur d'Alene. Its franchise is not exclusive. (R.p. 98).

The City of Coeur d'Alene has the legal right under the Constitution and laws of the State of Idaho to construct and operate its own municipal lighting system. It is not required to secure a certificate of convenience and necessity from the Public Utilities Commission before constructing such a system, as municipal corporations are expressly excepted from such requirement by the provisions of Section 59-104, Idaho Code Annotated, which reads as follows:

> "59-104. The term "corporation" used in this act includes a corporation, a company, an association and a joint stock association, but does not include a municipal corporation . . ."

In construing this section, the Supreme Court of Idaho has held that municipally owned utilities are not under the jurisdiction of the Public Utilities Commission.

Kiefer v. City of Idaho Falls 49-Ida. 458, 289, Pac. 81

Manifestly the construction and operation of a municipal light plant and distribution system by the City of Coeur d'Alene can not result in a legal injury to appellee since the City will be doing only what it has a lawful right to do. The injury which may result to appellee through the construction and operation of a competing municipal electric plant will result solely from the fact that such a plant is physically constructed and operated, and not because the funds for its construction are obtained from any particular source. The source of the funds is merely incidental.

It is the public policy of the State of Idaho to permit its cities and villages to own and operate their own municipal light and water systems. The legislature has not enacted any statutes restricting such rights. On the contrary, the legislature has encouraged municipally owned light and water plants by removing the limitations on the amount of indebtedness which can be incurred for such purposes so long as the constitutional requirements are complied with. Private owners of public utilities in the State of Idaho are not protected from competition by

municipal plants. The risk of competition from a municipally owned plant is inherent in the nature of the business in which the appellee is engaged.

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT IS CONSTITUTIONAL.

The subject matter of the act is within the provisions of Article I, Section 8 of the Constitution of the United States, which provides:

> "Section 8. The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States;
> * * * * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

The title to the National Industrial Recovery Act reads as follows:

> "An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes."

The declaration of Policy declared in Section 1 of Title I of the Act reads as follows:

> "Section 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign com-

merce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Title II of the act is entitled "Public Works and Construction Projects." The provisions of the first section of Title II (Section 201) authorize the President to create a Federal Emergency Administration of Public Works to "effectuate the purposes of this title," and provide that all the powers of the "Administration" so created shall be exercised by a Federal Emergency Administrator of Public Works. The President is empowered to establish such agencies as he may find necessary, and to delegate any of his functions and powers under Title II to such officers, agents and employees as he may designate or appoint.

Pursuant to this authority, the President has created the Federal Emergency Administration of Public Works, and has delegated to the Administrator sufficient of his

functions and powers under the Act to enable him to execute the law.

Under the Provisions of Section 202 of Title II of the Act, the Administrator, under the direction of the President, is commanded to prepare a comprehensive program of public works which shall include among other things, the various types of projects therein enumerated.

It appears from the above and other provisions of the Act, that by Title II of the National Industrial Recovery Act, the Congress found and declared the following (among others) to be national purposes:

1. The preparation of a comprehensive program of public works, co-extensive with the boundaries of the United States, and including not only the several States but also Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

2. A prompt increase of employment by means of Federal construction or Federal aid in financing the construction of projects included in the comprehensive program of public works prepared by the Administrator pursuant to the mandate of the Act.

3. The promotion of the thirty-hour week and consequent spreading of employment.

4. Increasing purchasing power by requiring the payment of just and reasonable wages.

5. Preference for veterans in the employment of labor on the public works projects.

Since the recent decision of the Supreme Court of the United States in *United States v. Butler, decided January, 6, 1936 ..... U. S. ....., 80 Law Ed. 287*, the power of Congress to authorize expenditure of public moneys for purposes other than those directly enumerated in the Constitution is no longer an open question. In the opinion the Court said:

> "It results that the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of the legislative power found in the Constitution." *U. S. v. Butler, supra.*

This decision disposes of the Finding and Conclusion of the lower Court that "Article I, Section 8, Clause 1 of the Constitution of the United States does not authorize Congress to levy taxes or appropriate money for objects not within the enumerated powers expressly delegated to the Federal Government." (R. p. 259.)

It also makes erroneous the view of the lower Court as stated in the opinion granting the temporary injunction, and afterwards accepted as the "law of the case" in which the Court stated "those powers enumerated were all with the view of the "Common Defense and General Welfare" and are parts of the sentence which embraced the whole of the eighth section of the firstArticle. Their objects cannot be stretched beyond the objects indicated in the enumerated powers granted by the Section." (R.p. 154).

The decision of the Supreme Court is also contrary to

the view expressed by the lower Court, in said opinion that "if Congress is not authorized to legislate upon a certain subject matter, then it would follow that it may not appropriate any money to carry out such unauthorized subject matter." (R.p. 159).

Title II of the National Industrial Recovery Act in authorizing loans and grants to the states and municipalities for constructing public works and projects provides for national as distinguished from local welfare.

The question as to the national purpose of the appropriation is to be determined, in the first instance, by Congress, and in determining what will provide for the national welfare, the discretion of Congress is not subject to review by the Courts. If the Courts possess the power to review the determination of Congress under any circumstances, it should be confined to a plain and palpable abuse. If the question is such that reasonable men may differ in their opinions, certainly no Court should set up its opinion against the opinion of Congress. It becomes a question of policy, and with legislative policy, the Courts have nothing to do. The Supreme Court said in *United States v. Butler, supra*, "This Court neither approves nor condemns any legislative policy."

At the time the National Industrial Recovery Act was passed general unemployment existed throughout the nation. Millions of our citizens were out of work and were dependent upon private charities and public relief for the necessities of life. Unemployment was not confined within the boundaries of any single State but was

national in its scope. Private agencies and local and state governmental agencies were no longer able to meet the widespread demand for relief. The purpose of Congress "to reduce and relieve unemployment" as stated in the Declaration of Policy set forth in Section 1 of Title I of the Act, was the primary purpose for the enactment of law. Senator Wagner, the member of the Committee in charge of the bill in the United States Senate stated:

> "Mr. President, the National Industrial Recovery Bill is an employment measure. Its single objective is to speed the restoration of normal conditions of employment at wage scales sufficient to provide a comfort and decent level of living."
> 77 Cong. Rec. 51-52, (1933).

"The rule that Congressional debates will not ordinarily be considered by a Court interpreting a Federal statute does not apply to remarks made by a member of the Committee in charge of the bill."

> *Binns v. United States*, 194 U. S. 486, 495, 27 Ops. Attorney Gen. (1908) 68, 78.

The conception of the project by the lower Court as shown by the opinion and findings appears to be limited to the proposed municipal electric plant in the City of Coeur d'Alene, standing separate and alone and viewed only by itself. The lower Court treats the project as if it were a single isolated project wholly unrelated to any program of public works. The lower Court said, "The Construction of a Diesel engine plant and light system in and to be used solely by the inhabitants of the City of Coeur d'Alene, would not in any way be for a national

purpose and to assert under the facts in the bill that its construction would relieve unemployment, and that an emergency existed does violence to the English language." (R.p. 159).

It is from this narrow viewpoint that the legal principles involved in the case were applied. The lower Court applied them to the Coeur d'Alene project as if it were the only municipal electric plant included in the comprehensive program to be financed by the Federal Emergency Administration of Public Works.

The true conception of the subject is that the Coeur d'Alene project is only one of the many thousands of similar projects scattered throughout the length and breadth of the land. It is but a small part of the comprehensive program of public works authorized by the National Industial Recovery Act and prepared by the Federal Emergency Administrator of Public Works for the purpose of effectuating the purposes of the law.

If we consider the Coeur d'Alene project from the proper point of view, we see first a broad comprehensive national program of public works designed to reduce and relieve unemployment, and to rehabilitate industry, and we then see the Coeur d'Alene project as one of the units in the general plan, which with thousands of similar units make up the comprehensive program contemplated by the law. The Coeur d'Alene project when viewed by itself is local in character, but when viewed as an integral part of a comprehensive plan and program, it is national in scope and character.

The question is how will the comprehensive program affect the nation as a whole, and not what will be accomplished in the City of Coeur d'Alene. Will the national program of public works, of which this project is a part, assist in reducing and relieving unemployment throughout the nation, and will it help to rehabilitate industry? If it appears reasonable that such results may be accomplished nationally, it is unimportant whether or not the Coeur d'Alene project will directly relieve unemployment locally.

The relief of unemployment is a national purpose—one which has to do with the prosperity, the growth, the honor and peace and dignity of the nation. With more than ten million of its citizens out of work and on relief, no country can be prosperous—it cannot continue normal growth. Such a condition reflects upon the honor and dignity of the nation and may even thereaten its peace. Hunger and destitution will in time undermine the foundation of the government—the loyalty and patriotism of its citizens—upon which the existence of the nation depends.

The purpose of the National Industrial Recovery Act was to relieve national unemployment. The loan and grant of the federal funds to the City of Coeur d'Alene is one of the means adopted to carry out that purpose. The construction of the municipal electric plant is incidental to the main object sought to be accomplished. It is merely one link in the chain of public works comprising the comprehensive program. The relief of unemployment

became a national problem. It is common knowledge that the burden of relief became too great even for the states to handle. Congress could not ignore this condition and the Court should not ignore it.

"To do this would be to shut our eyes to what all others than we can see and understand."

Child Labor Tax Case (*Bailey v. Drexel Furniture Co.*) 259 U. S. 2037,

United States v. Butler, Supra, p. 293.

"Does Title II of the National Industrial Recovery Act, in authorizing loans and grants to the States and municipalities for constructing public works or projects, provide for the "general welfare" as we have construed these words in the Constitution?"

"That is a question to be determined in the first instance by Congress, and in determining what will provide for the general welfare, Congress must be accorded wide discretion. With its determination the Courts may not interfere unless it clearly and indubitably appears that the purpose for which a tax is to be laid, collected and appropriated is not within the limitations fixed by the Constitution."

Kansas Gas and Electric Company v. City of Independence, Kansas, 79 Fed. (2nd) 32.
Greenwood County, S. C. v. Duke Power Co.
..... Fed. Suppl. .....

TITLE II OF THE NATIONAL INDUSTRIAL RECOVERY ACT IS NOT AN UNCONSTITUTIONAL DELEGATION OF THE LEGISLATIVE POWER OF CONGRESS TO THE PRESIDENT.

Appellee contended in the Court below that in so far as Title II of the National Industrial Recovery Act empowers the President and the Administrator to determine the projects to be included in the comprehensive program of public works, it is an unconstitutional delegation of

legislative power and relied upon the decisions of the Supreme Court of the United States in *Panama Refining Co. v. Ryan,* 293 U. S. 388, 55 S. C. T., 241, 79 L. Ed. 446, and *Schechter v. United States,* 295 U. S. 495, 55 S. C. T., 837, 79 L. Ed. 1570, in support of its position.

In *Panama Refining Co. v. Ryan supra,* the Supreme Court held that Section 9 (c) of Title I of the National Industrial Recovery Act was an unconstitutional delegation of the legislative power to the President. In construing the section and defining the power which was delegated to the President, the Court said:

> "The section purports to authorize the President to pass a prohibitory law."
>
> "The question whether that transportation shall be prohibited by law is obviously one of legislative policy."
>
> "So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonable."
>
> *Panama Refining Co. V. Ryan, supra.*

In *Schechter v. United States, supra,* the Supreme Court held that Section 3 (a) of Title I of the National Industrial Recovery Act was an unconstitutional delegation of legislative power to the President in authorizing the approval of codes of fair competition having the effect of laws.

The Supreme Court construed section 3 (a) of Title

I of the Act, and the power therein delegated to the President as a legislative power to authorize the making of prohibitory laws through the adoption and approval of codes having standing as penal statutes. The Court stated in the opinion:

> "But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the law-making power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes."
>
> "We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of law which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. Codes of laws of this sort are styled "codes of fair competition."
>
> "The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot

delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

"And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country."

Schechter v. United States, supra.

The powers delegated to the President by section 3 (a) and section 9 (c) of Title I of the National Industrial Recovery Act were expressly held by the Supreme Court to be the power to make prohibitory laws by executive orders or by the approval of codes of fair competitive orders or by the aprpoval of codes of fair competition were penal statutes and violations thereof were made punishable by fines and imprisonment.

Thus, it is apparent that by the provisions of the recovery act which were condemned in each of the cases above cited, the Congress attempted to delegate to the President the power to make laws. Is it to be wondered at that the Supreme Court says that "Such a sweeping delegation of legislative power finds no support in the decisions upon which the government especially relies." On the contrary, it seems that no other decision could have been rendered under our constitutional system.

We do no question the soundness of the views expressed by the Supreme Court in the cases cited, but we contend that they have no application to Title II of the National

Industrial Recovery Act or to the state of facts involved in this case. The general expressions contained in the opinions in the cited cases are not to be extended beyond the questions therein discussed and decided. In this connection it is well to call attention to the opinion of Chief Justice Marshall in the case of *Cohen v. Virginia,* 6 Wheat. 264, 399, 5 L. Ed. 257, 290, in which a similar situation was presented in respect of certain general expressions in the opinion in *Marberry v. Madison.* The Chief Justice, in commenting on the opinion in the Marberry case, said:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."
>
> *Cohen v. Virginia, supra.*
>
> *Rathbun v. United States,* (*Humphrey v. United States*) 295 U. S. 602.

In the Rathbun case it was contended that a decision by the Supreme Court in *Myers v. United States,* 272 U.S. 52, 71 L. Ed. 160, recently decided and fully reviewing the general subject of the power of executive removal, was controlling, the Court said that expressions occurred in the course of the opinion of the Court in that case

which tended to sustain the government's contention, but held that they were beyond the point involved and cited with approval that portion of the opinion of Chief Justice Marshall in *Cohen v. Virginia, supra,* above quoted.

The statements made by the Court in the opinions in the cases relied upon by appellee relate to the delegation of power to the President to make prohibitory laws. They do not relate to the power of the President to spend money which has been appropriated by Congress. They do not relate to the power to select the individual projects to be included in the comprehensive program of public works for which the money is to be expended. The difference between the power to make prohibitory laws and other powers of a different nature was recognized by the Supreme Court in the Panama Refining Co. case when it said:

> "Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained."

"We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review, or with the presumptions attaching the executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown."

And again in the Schechter case, the Court said:

"We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the Panama Ref. Co. case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality which will enable it to perform its functions in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply."

Title I of the National Industrial Recovery Act relates to rules governing the conduct of individuals in their various lines of business. Since these rules are to have the effect of penal statutes, they are in effect laws. The power to make them is an exercise of the lawmaking power.

Title II of the National Industrial Recovery Act contains directions to the President and the executive department of the government relative to the expenditure of appropriations made by the Congress. Any agreements

made by the recipients of the government's bounty are voluntary agreements. In the case of municipalities, they can accept or reject the proffered funds at their pleasure. The rules and regulations governing the disbursement of the funds are provided for the orderly conduct of the program. They are not laws. No individual is compelled to obey them. Any obligation to conform to their requirements is voluntarily assumed.

The expenditure of money is an executive function. The Congress, in the exercise of its lawmaking power, has prescribed certain classes of projects which the executive department may finance with a view to providing employment quickly. The selection of the individual projects within these general classes is an administrative matter; it is not a legislative function.

The powers delegated to the President by Title II of the National Industrial Recovery Act are purely administrative. The President is charged with the duty of executing the law. The Congress completed the exercise of all essential legislative functions when it enacted the law.

The distinction between the power attempted to be conferred by section 3 (c) and section 9 (a) of Title I of the Act and those conferred by Title II is apparent, and is illustrated by the cases cited in the opinion in Panama Refining Co. case in which the difference between legislative functions and executive actions is pointed out.

Thus, in *Buttfield v. Stranahan,* 192, U. S. 470, an

Act of Congress was upheld which authorized the Secretary of the Treasury, upon the recommendation of a board of experts to "establish uniform standards of purity, quality and fitness for the consumption of all kinds of tea imported into the United States and to exclude from importation such teas as would not satisfy these requirements." In sustaining the constitutionality of this Act, the Supreme Court said: "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave the executive officials the duty of bringing about the result pointed out by the statute."

In *Union Bridge Co. v. United States,* 204 U. S. 364, 386, where the Secretary of War was given authority to determine whether bridges and other structures constituted unreasonable obstacles to navigation and to remove such structures, it was held that by the statute the Congress had declared "a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule."

In *Federal Radio Commission v. Nelson Bros. Bond and Morg. Co.* 289 U.S. 266 the Court, in construing the provisions of the Radio Act, held that the standard set-up was not so indefinite "as to confer an unlimited power."

In *Field v. Clark*, 143 U. S. 649, it was contended that the statute involved was an unconstitutional delegation of legislative power, but the Court held that "what the President was required to do was merely in execution of the Act of Congress," and this statement was approved

in the later case of *J. W. Hampton, Jr. and Co., v. United States,* 276 U. S. 394, in which the constitutionality of section 315 of the Tariff Act of September 21, 1922, was involved. This Act delegated power to the President of the United States to change rates under flexible tariff provisions. In upholding the constitutionality of the Act, the Court said:

> "The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the Executive Branch, within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute, and directing details of its execution, even to the extent of providing for penalizing a breach of such regulations."

In the opinion of the Court delivered by Mr. Chief Justice Taft, the following statement from the case of *Cincinnati, Wilmington and Zanesville R. R. Co. v. Commissioners,* 1 *Ohio St.* 77, 88, was quoted with approval:

> "The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

The Supreme Court has upheld the delegation of power to exercise discretion in the carrying out of a congressional act in the following cases:

St. Louis Iron Mt. & So. Ry. v. Taylor, 210 U. S. 281, in which the Interstate Commerce Commission was auth-

orized to designate standard height and maximum variation of drawbars for freight cars.

United States v. Grimaud, 220 U. S. 506, in which the Secretary of Agriculture was given power to prescribe regulations for use of national forest reservations.

Interstate Commerce Commission v. Goodrich Transit Company, 224 U. S. 194, in which the Interstate Commerce Commission was authorized to require carriers to keep accounts in specified manner.

It is clear from a review of the decisions of the Supreme Court that the cases in which the delegation of legislative powers to the executive has been held unlawful are those where the conduct of individuals is sought to be regulated by executive orders or departmental rules, or private rights have been affected. In none of the cases has the Court held that the making of expenditures is an unconstitutional delegation of legislative power.

Section 212 of Title II of the Act provides that "the Administrator, under the direction of the President shall prepare a comprehensive program of public works, which shall include 'the several classes of public works enumerated in sub-sections (a), (b), (c), (d), and (e),' thereof."

Section 203 of Title II of the Act authorizes and empowers the President, through the Administrator or through such other agencies as may designate or create "with a view to increasing employment quickly," to make reasonably secured loans to carry out any public works

project included in the program, and to make grants to states, municipalities or other public bodies for the construction, repair or improvement of any such project.

Section 206 of Title II of the Act prescribes the provisions to be included in the contracts for loans and grants.

The standard for the program of public works is laid down in Section 202. The project involved in this case falls within a specifically enumerated class.

The standards as to the projects which may be financed or aided by loans or grants are laid down in Section 203 and 206. They must be public works projects included in the program prepared pursuant to Section 202. The loan or grant must be made with a view to increasing employment quickly, and the loans must be reasonably secured.

Under such a program of public works as was designed by Section 202, it was not practicable for Congress to specify particular projects or determine what loans or grants should be made for particular projects. This required investigation and the exercise of administrative discretion.

The term "authorize and empower" was a direction to the President to select from the different classes of projects specifically designated in Section 202, the particular ones within the limitations specified best calculated to carry out the purpose of the Act.

The Act should be construed as implying a direction to the President to carry out and effectuate its purposes, and to make loans and grants within the limits of a reasonable discretion for projects within the classes included in the program.

The Congress may delegate any nonlegislative power which it may itself lawfully exercise. It does not necessarily follow from the fact that the power delegated was one which the Congress itself might rightfully exercise, that it was a legislature power or one which could not constitutionally be delegated.

"Congress may certainly delegate to others powers which the legislature may rightfully exercise itself . . . the line has not been exactly drawn which separates those important subjects which must be entirely regulated by the legislature itself, from those of less interest in which a general provision may be made and power given to those who are to act under the general provisions, to fill up the details."

Wayman v. Southard 10 Wheat (U.S.) 1, 6 L. Ed. 253
Greenwood County, S. C. v. Duke Power Co.
..... Fed. Suppl. .....

THE LOAN AND GRANT IS NOT IN VIOLATION OF THE TENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In its conclusions of law, Nos. VI, VII and VIII, the lower Court held that the loan and grant to the City of Coeur d'Alene is in violation of the Tenth Amendment to the Constitution of the United States. (R.p. 260). The

conclusions are based upon Finding of Fact No. XXV to the effect that the grant and loan, if made, will be because of the refusal or failure of the appellee to accede to the demands of the Federal Emergency Administrator of Public Works to be permitted to fix and regulate rates, charges and services of the plaintiff as a public service corporation engaged in intra state business in the State of Idaho. (R. p. 256), and the administrative methods adopted by the Administrator as a basis of selection for making such loans and grants.

That the Court may not review the exercise of the administrative discretion imposed on officers of the government by acts of Congress, has been decided in many cases which will be cited in this brief in the support of the proposition that judicial discretion may not be substituted for executive discretion.

The fact that the administration of the recovery act affects matters not directly subject to the control of Congress, such as a reduction of rates by private companies through municipal competition, cannot affect the validity of the Act if its broad purpose lies within the power of Congress.

United States v. Chandler-Dunbar Co.,
229 U. S. 53.

Alabama Power Co. v. Gulf Power Co.,
283 Fed. 606, 613.

Walters v. Phillips,
284 Fed. 237.

Alabama v. United States,
38 Fed. (2d) 897.

Greenlee Bay Canal Co. v. Patton Paper Co.
172 U. S. 58.

Interstate Commerce Commission v. Brimson,
154 U. S. 447,

Northern Securities Co. v. United States,
193 U. S. 197.

Smith v. Kansas Title and Trust Co.
255 U. S. 180.

The purpose of the Tenth Amendment was to prevent the invasion of the reserved rights of the states by the Federal Government. It was not designed to prevent the States and their political subdivisions, including municipalities, from voluntarily accepting aid or assistance from the Federal Government. As a condition to granting such aid or assistance, the Federal Government may impose limitations, requirements or conditions, and that is exactly what it has done in this case and nothing more. The City of Coeur d'Alene does not have to accept the loan and grant or either of them. If, however, it desires to accept them, it must be on the conditions imposed by the administrator. The City of Coeur d'Alene is willing to accept the loan and grant subject to the conditions imposed, and if there was ever any doubt as to its lawful right to do so that doubt has been removed by Chapter 2 of the Laws enacted at the Extraordinary Session of the Idaho Legislature held in 1935, immediately following the adjournment of the regular session (1935 Session Laws, Extraordinary Session, p. 6).

This Act provides that every municipality shall have power and is hereby authorized:

"(a) to accept from any Federal agency

grants for or in aid of the construction of any public works project.

(b) to make contracts and execute instruments containing such terms, provisions and conditions as in the discretion of the governing body of the municipality may be necessary, proper or advisable for the purpose of obtaining grants or loans, or both from any Federal agency pursuant to or by virtue of the Recovery Act; to make all other contracts and execute all other instruments necessary, proper or advisable in or for the furtherance of any public works project and to carry out and perform the terms and conditions of all such contracts and instruments.

(c) to subscribe to and comply with the recovery act and any rules and regulations made by any federal agency with regard to any grants or loans, or both, from any federal agency.

(d) to perform any acts authorized under this act, through, or by means of its own officers, agents or employees, or by contracts with corporations, firms or individuals.

(e) to award any contract for the construction of any public works project or part thereof upon any date at least fifteen days after one publication of a notice requesting bids upon such contract in a newspaper of general circulation in the municipality.

(f) to sell bonds at private sale to any federal agency without giving public advertisement.

* * * * * * * *

(j) to exercise any power conferred by this act for the purpose of obtaining grant or loan or both, from any federal agency pursuant to or by virtue of the recovery act, independently or in conjunction with any other power or powers conferred by this Act or heretofore or hereafter conferred by any other law.

(k) to do all acts and things necessary or convenient to carry out the powers expressly given in this act."

The law is a declaration of legislative policy and demonstrates conclusively that it is the public policy of the State of Idaho to permit and encourage municipalities to avail themselves of the loans and grants provided by the Federal Government.

It is also the public policy of the State of Idaho to permit and encourage municipalities to acquire and operate muncipal light and water systems. Not only is there no statute restricting the exercise of such right, but the limitation imposed on muncipalities in incurring indebtedness for other purposes is removed so far as light and water systems are concerned. The statutory limitation of bonded indebtedness in other cases does not apply to the bonded indebtedness for such systems.

Municipal corporations in Idaho are expressly excepted from the jurisdiction of the Public Utilities Commission by Section 59-104, Idaho Code Annotated, which reads as follows:

> "59-104. The term "corporation" when used in this act includes a corporation, a company, an association and a joint stock association but does not include a muncipal corporation . . ."

In construing this section, the Supreme Court of Idaho has held that municipally owned utilities are not under the jurisdiction of the Public Utilities Commision.

Kiefer v. City of Idaho Falls,
49 Ida. 458, 289 Pac. 81.

Under Section 203 (a), the President is authorized

and empowered through the Administrator to make loans and grants to finance or aid in financing any public works projects included in the program under the provision of Section 202. The loans are to be reasonably secured and the grants are to be made upon such terms as the President shall prescribe.

The Act contemplates that any loans made by the United States to municipalities shall be reasonably secured and it also contemplates that the President shall impose such terms as he deems proper as a condition to the making of the grant. Both loans and grants are to be made upon conditions which must be determined by the executive.

In *United States v. Butler, supra,* the Supreme Court held the Agricultural Adjustment Act invalid on the ground that it invades the reserved rights of the states, but the Court recognized that the appropriation of money can be coupled with conditions regulating its expenditure, stating in the opinion:

> "We are not here concerned with a conditional appropriation of money, nor with a provision that if certain conditions are not complied with, the appropriation shall no longer be available. By the Agricultural Adjustment Act, the amount of the tax is appropriated to be expended only in payment under contracts whereby the parties bind themselves to regulation by the Federal Government. There is an obvious difference between a statute stating the conditions upon which money shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."
>
> *U. S. v. Butler, supra.*

The loan and grant agreement involved in this case contains certain conditions precedent to the government's obligations to make the loan and grant including the condition that the City shall adopt a rate and bond ordinance satisfactory to the Administrator in form, sufficiency and substance. (R.p. 118).

In making provision to reasonably secure the loan, the administrator had the right to consider the effect of the rates to be charged by the City on the adequacy of the security. It was within his province to consider any maters which in his judgment would have a bearing upon the security for the loan. It is quite possible that the bonds evidencing the loan would be better secured if lower rates are established as that may be necessary to enable the City to obtain a sufficient amount of the business to operate the electric system economically. It is not an unreasonable condition arbitrarily imposed by the Administrator upon the municipality to regulate its rates, but is a necessary precaution to insure the success of the project and thereby reasonably secure the loan.

The loan and grant agreement embraces all the terms of the contract between the United States and the City. The conditions contained in the so-called release of the Federal Emergency Administration of Public Works (R. p. 53-57), and in the letter of November 21, 1934, to the Mayor of Coeur d'Alene, (R. p. 67-68) are not included in the contract and are not binding on the City. The conditions contained in the letter to the effect that the rate ordinance should state that the rates will not be increased

unless approved by the Adminsitrator, is not a part of the contract, and such a provision in the ordinance would be void and unenforceable.

With reference to the practice of giving the private utility an opportunity to put lower rates into effect, it is a distortion of the facts to say that this policy is prejudicial to the private utility company. It is a concession made to the private utility company to avoid the government financing of a municipally owned plant if it desires to take advantage of it. The private utility company is not injured by having the opportunity to establish lower rates and thereby prevent the installation of a competing system financed by the government. It is a policy designed to protect existing privately owned systems against the competition of municipally owned plants if they see fit to furnish electricity at rates as low as the rates of the municipality.

The reduction of rates by the private utility operating the existing plant in the municipality is not in any sense a condition to the making of the loan and grant. It is merely an exception to the general plan of government financing of municipal projects and is a favor extended to the private utility company if it sees fit to accept it.

The matter of rates is a detail in the administration of the program for the construction of public works projects. It can not be successfully contended that the relief of unemployment is not the primary object of the program merely because as an incident in the administration thereof, the reduction of rates for electricity is deemed

necessary or desirable to reasonably secure the loan or to prescribe the terms of the grant.

It is the province of the President, acting through the Administrator, in the exercise of a reasonable discretion, to determine what requirements are necessary to reasonably secure the loans, and what conditions shall be prescribed for the making of the grant. The motives actuating the executive in the determination of such matters are not the subject of judicial inquiry.

In the case of *Dakota Cent. Teleph. Co. v. South Dakota*, 250 U. S. 163, 182, 184, the Supreme Court said that the contentions made in the case assailed the motives which it is asserted induced the exercise of power by the President, and then stated in the opinion:

> "But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves conditions which are beyond the reach of judicial power. This must be, since, as this Court has often pointed out, the judicial may not invade the legislative, or executive department so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion."

In *United States v. Chemical Foundation*, 272 U. S. 1, 14, 15, the Supreme Court said that presumption of regularity supports the official acts of public officers, and in the absence of clear evidence to the contrary the courts presume that they have properly discharged their duties, and stated in the opinion:

> "Under that presumption it will be taken that

Mr. Polk acted upon knowledge of the material facts. The validity of the reason stated in the orders or the basis of fact on which they rest will not be reviewed by the Courts."

"Nor does the Federal Government by making loans and grants under this Act encroach on the soverign rights of the States. It does not enter the territorial limits of the States and there, through its own agencies or instrumentalities engage in a non-federal activity. It simply advances funds by loans and grants to States and their agencies to carry out their powers to construct public projects for the purpose of promoting the general welfare of the United States."

Kansas Gas and Electric Company v. City of Independence Kansas, 79 Fed. (2nd) 32.

THE ADMINISTRATIVE DISCRETION OF THE EXECUTIVE DEPARTMENT IS NOT SUBJECT TO JUDICIAL REVIEW.

In the trial of this case, over the objection of appellants, the lower Court received evidence with respect to the adequacy and cost of the proposed municipal electric plant and made Findings based on such evidence to the effect that the proposed plant is not adequate and that the cost of an adequate system would exceed the funds provided therefor. (R.p. 250-251).

Appellants contend that these matters were not proper subjects for judicial inquiry, and that the Court improperly interefered with the administrative functions of the executive department of the government.

The application of the City of Coeur d'Alene to the Federal Emergency Administrator of Public Works for the loan and grant in controversy in this case (Plaintiff's

Exhibit No. 1, R. p. 433) was accompanied by an engineer's report (R. p. 446) containing an estimate of the cost of the proposed system. The application states that it has been prepared and the data is presented in accordance with Circular No. 2, of the Federal Emergency Administration of Public Works, issued under date of August 1, 1933, outlining the information required with application for loans to municipalities and other public bodies. Included in the information required is an estimate of the cost of the project (R. p. 476).

Circular No. 1 issued by the Federal Emergency Administration of Public Works (Plaintiff's Exhibit No. 3, R. p. 457), among other things, outlines the procedure for the consideration of applications from municipalities for loans and grants, including an examination by a State engineer appointed by the Administrator, and a recommendation by a State Advisory Board. (R. p. 472-473). When all needed information has been supplied, the application is to be listed for final examination, and upon completion of the examination, the engineer is to submit the application to the Board and the Board to the Administrator with its recommendation. (R. p. 473).

The report of the engineer was prepared to accompany the application for the loan and grant. (R. p. 390-391). Its purpose was solely for use with the application. (R. p. 415). It was a preliminary plan compiled and prepared to comply with the regulations of the administration as given out by its published information. (R. p. 391). It was not prepared as the final plan or detailed specifica-

tions of the project. (R. p. 415). Since the application was approved and the loan and grant authorized, it necessarily follows that the application and the engineer's report were both sufficient in form and substance to satisfy the Federal Emergency Administration of Public Works.

At the time this suit was filed and further proceedings to consummate the loan and grant were enjoined, the project had not yet reached the stage for the preparation of the final plans and detailed specifications. (R. p. 416). Consequently the final costs of the project had not been finally determined either by the Federal Emergency Administrator of Public Works, or by the City of Coeur d'Alene, and could not be determined until the final plans and detailed specifications had been prepared. With the proceedings pending at this stage before the Executive Department, at the time of the trial, the Court received evidence as to what the project would actually cost and made findings on that subject. Also evidence was received and findings made with respect to the adequacy of the project. This was an interference with the Executive Department in the exercise of its administrative discretion. The rulings of the Court admitting this evidence over the objecton of the appellants were erroneous and the findings were improperly entered.

> "Courts will not interfere with ordinary functions of executive departments of government."
>
> *Fish v. Morganthau*, 10 Fed. Supp. 613.
>
> "It is equally plain that such perennial powers lend no support whatever to the proposition that we may under the guise of exerting judicial power,

usurp mere administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been widely exercised."

"Indeed, the arguments just stated and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils."

Interstate Commerce Commission v. Illinois C. R. Co., 55 L. Ed. 280.

An interesting case is "Honolulu Rapid Transit and L. Co., v. Hawaii," 53 Law Ed. 186. The appellant, the Street Railway Company, had been running cars at intervals of ten minutes and proposed to discontinue the schedule and establish one with longer intervals, and had applied to the superintendent of public works for permission to put into effect the proposed schedule. By a statute, regulation of such matters was left to the Superintendent of Public Works with the approval of the Governor. However, the Attorney General brought a suit in equity, seeking an injunction to prevent the company running the cars at less frequent intervals than ten minutes, alleging that the convenience of the public required the maintenance and continuance of the ten minute schedule. Evidence was taken, and an injunction issued against the change. The Supreme Court said:

"But the action of the Court below went much farther than this, and farther than as warranted by any decision which has been called to our attention. In the absence of a more specific and well defined duty than that of running a sufficient number of cars to meet the public convenience, the Court, in this case, inquired and determined, as a matter of fact, what schedule the public convenience demanded on particular streets, and then, in substance and effect, compelled a compliance with that schedule. And this was done, though, as will be shown, the full power to regulate the management of the railway in this respect was vested by the statute in the executive authorities."

The Court then proceeds to illustrate the effects of non-observance of the powers between the judicial and legislative field.

See 12 Corpus Juris, Constituional Law, Section 393, P. 894.

"An official to whom public duties are confided by law, is not subject to the control of the courts, in the exercise of the judgment and discretion which the law reposes in him as part of his official function."

"This doctrine is as applicable to the writ of injunction as it is to the writ mandamus."

Gaines v. Thompson, 19 Law Ed. 62.

"If the matter in respect to which the action of the official is sought, is one in which the exercise of either judgment or discretion is required, the Courts will refuse to substitute its judgment or discretion for that of the official entrusted by law with its execution. Interference in such a case would be to interfere with the orderly functions of government."

Louisiana v. McAdoo,
234 U. S. 627, 58 Law Ed. 1506.

> "It has been settled from the adoption of the Constitution of the United States, dividing the powers of Government into three departments, that the judiciary cannot properly interfere with executive action when the executive officer is authorized to exercise his judgment or discretion; that it is only in cases where the executive officer has to perform a purely ministerial act that the Courts, either by proceeding in mandamus or injunction, can direct or control the performance of such act."
>
> *Dudley v. James*, 83 Fed. 345.

It has been repeatedly held by the Supreme Court that the exercise of the administrative discretion reposed in officers of the Government by acts of Congress, is not subject to judicial review in the absence of palpable abuse.

Houston v. St. Louis Independent Packing Co., 249 U. S., 479; City of New Orleans v. Payne, 147 U. S. 261; Interstate Commerce Commission v. Chicago & Alton Ry. Co., 215 U. S., 479; Johnson v. Drew, 171 U. S., 93; Decatur v. Paulding 14 Pet. 497, 10 L. Ed. 599; Burfening v. Chicago etc. Ry. Co., 163 U. S. 321; Smith v. Hitchcock 226 U. S. 53.

The inquiry into the costs of the construction of the system was premature. The final costs are conjectural. The findings in this respect were necessarily based upon the assumption that if the City could not construct the plant for the amount provided for after advertising for bids, it would proceed with the project and contract an indebtedness for a larger amount. Such an assumption is without jusification. The evidence does not tend to show that the City of Coeur d'Alene threatens to expend a

greater amount in the construction of a system than has been made available by the loan and grant. If it proves anything, it is that the City will construct with the money so obtained, an incomplete system. If such a conclusion is warranted from the evidence, it is a matter solely between the Federal Emergency Administrator of Public Works and the City.

Furthermore the evidence fixing the costs as of November, 1934, did not warrant the findings with respect to the actual costs of the construction of the system. The testimony is not undisputed that prices greatly increased between 1933 when the estimate of costs was made by the engineer for the City and November, 1934, when they were estimated by engineers for appellee. (R. p. 377). It is also undisputed that such increases were the results of codes under the N.R.A. Prices were increased after the code went into effect. (R. p. 375). The increases in prices resulted from an artificial condition created by the N.R.A. and the codes. This condition has ceased to exist. It necessarily follows that since the artificial condition which caused the increased costs no longer exists, it can not be assumed that the higher costs will continue. No presumption arises that higher prices will prevail when the plant is constructed. The costs of the plant can be determined when and only when bids are received. The conditions existing at that time will govern the costs. In the meantime, the estimate of costs contained in the engineer's report accompanying the application of the City for a loan and grant (Plaintiff's Exhibit No. 1 R. p. 446) should be accepted as the proper criterion since they were so ac-

cepted by the public works administration. The accuracy of the costs at the time the application was made has not been challenged. Estimates of the cost of construction are in a large measure matters of opinion based upon the type of construction which will be used after the final plans and detailed specifications have been made. The engineers testifying for appellee, selected a certain type of construction and the period of highest costs as the basis for their estimates. It was to the interest of appellee for them to use such a basis. It may fairly be assumed that their opinions as to costs were influenced in some degree at least by their interest in the case. All of them were either employees of appellee or the holding company of which it is a part, or its subsidiaries.

THE LOAN AND GRANT IS NOT IN VIOLATION OF SECTION 3 ARTICLE VIII OF THE CONSTITUTION OF IDAHO.

Conclusions of Law Nos. IX and X are to the effect that by entering into the loan and grant agreement, the City of Coeur d'Alene has incurred an indebtedness or liability exceeding the revenue provided for it for such year in violation of Article VIII Section 3 of the Constitution of the State of Idaho, and that the expenditures contemplated and proposed by the City exceed the funds authorized, together with the grant and create a liability against the City in violation of said constitutional provision. (R. p. 260-261).

Section 3 of Article VIII of the Constituion of Idaho, reads as follows:

"3. Limitations on county and municipal indebtedness. No county, city, town, township, board of education, or school district, or other subdivision of the state shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void: PROVIDED, That this section shall not be construed to apply to the ordinary and necessary expenses authorized by the general laws of the state."

The Court did not find and it is not contended that the requirements of said constitutional provision have not been complied with by securing the assent of two-thirds of the qualified electors of the City voting at an election held for that purpose and by providing for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within twenty years from the time of contracting the same.

It therefore appears that the only basis for the findings is that the cost of the system will exceed the amount of the bonds authorized at the election.

The Constitutional provision above quoted has been construed by the Supreme Court of Idaho in the following cases:

Feil v. City of Coeur d'Alene, 23 Idaho, 32, 129 Pac, 643.

Miller v. City of Buhl, 48 Idaho, 668, 284. Pac. 843.

Straughan v. City of Coeur d'Alene, 53 Idaho, 494, 29 Pac. (2nd) 321.

In these cases the holding was to the general effect that the constitutional provision prohibits the incurring of a liability as well as a debt unless provision for payment is made as therein prescribed. In none of them is it held that a contract to expend money which has been made by grant to a municipality would come within the prohibition of that section of the Constitution.

The City of Coeur d'Alene is not anticipating the income or revenue for more than one year. The ordinance adopted by the City of Coeur d'Alene to provide funds with which to construct the power plant and distribution system called for a bond election to authorize the issuance of the bonds in the amount of $300,000. R. p. 91). The plan is to borrow from the federal government, a sum not to exceed $300,000. (R. p. 105). The government is to grant an additional amount equal to thirty percent of the cost of labor and materials. (R. p. 107). The City intends to spend for its plant and distribution system an amount not in excess of the loan and grant combined. The Court held that to provide for a plant costing in excess of $300,000, is to incur a debt or liability beyond the constitutional limitation, and that any contract entered into by the City to pay more than $300,000 violates the constitutional provision, even though the excess of

$300,000 which will be expended will be made by a grant from the federal government. (R. p. 165).

The money for the grant to the City has been appropriated and allocated and is available when and as the contract for the construction is let. So far as the City is concerned, this grant constitutes a part of the revenue provided for the year.

It is only an *indebtedness* or *liability* that falls within the condemnation of the constitutional limitations. An expenditure of money without the obligation of repayment is neither a debt or liability. It makes no difference how much the improvement costs if an indebtedness or liability does not arise from the transaction. The city is not prohibited from accepting a gift or grant, or from constructing any improvement at any cost if it can secure the funds for the project without incurring an indebtedness or liability to repay them.

We earnestly urge that the decree is erroneous and contrary to law and should be reversed.

Respectfully submitted,

W. B. McFARLAND

C. H. POTTS

Attorneys for Appellants, City of Coeur d'Alene, Idaho, a municipal corporation, City Officers and members of the City Council of said City of Coeur d'Alene, Idaho.

No. ——

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; ALFRED SWANSON, JOHN FREDERICK, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, RICHARD WEEKS, S. H. MCEUEN, AND J. H. POINTNER, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

APPENDIX TO MOTION OF APPELLANT, HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, TO REMAND CASE TO THE DISTRICT COURT AND MEMORANDUM IN SUPPORT THEREOF

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1. IMPORTANT DIFFERENCES BETWEEN THE PROPOSED NEW CONTRACT AND THE PROPOSED OLD CONTRACT

The proposed new contract differs from the proposed old contract in the following significant respects:

The old contract provided that the Government shall be under no obligation to pay for any of the bonds or to make any grant unless and until the Borrower shall adopt a rate ordinance, satisfactory to the Administrator in form, sufficiency, and substance. Certain requisites of this ordinance were set forth in detail (Paragraph 23 (i) of Part I). This provision as to rates is completely eliminated from the new agreement. The new instrument confers no authority whatever on the United States over rates, and, in fact, specifically provides as follows:

> 12. The Administrator shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project.

In addition, the provision whereby the City agreed to cease active operation of its Diesel plant and purchase power from Grand Coulee, Washington, when such power shall become available, has been eliminated from the new agreement.

In the case of *Arkansas-Missouri Power Company* v. *City of Kennett,* 78 Fed. (2d) 911 (decided by the Circuit Court of Appeals for the Eighth Circuit), the Court held that the loan and grant agreement between the Public Works Administration and the City of Kennett was invalid because the city had improperly attempted to delegate legislative power to the Federal government. The court said:

> While the Government, under this loan agreement, does not relieve the city of all responsibility in connection with the construction of the municipal plant, it certainly leaves to the city council little uncontrolled discretion with respect thereto. It is apparent that, while the Government was willing to finance the city, it insisted upon retaining sufficient control over plans, consruction contracts, labor, and materials, to insure that the money furnished would be spent in the way the government thought it should be spent, whether that was in accord with the ideas of the city council or not.

It is apparent that the provisions which the court had in mind were those which gave the Administrator the power, even after the plans and specifications were approved, to inject his own judgment and to overrule the judgment of the city with respect to the selection of labor and material and the manner of construction and to supervise the work during its progress.

Under that contract, whether or not the city was living up to its terms was to be determined, either by a subjective test, i. e., the satisfaction of the Administrator, or by rules and regulations to be adopted or changed by the Federal Government at will in the future. At the time the agreement was executed the city council could not tell with certainty exactly what it was required to do or what it would be required to do in the future. This test

of compliance, and this agreement to be subject to future actions of the other contracting party, is what the court condemned in the *Kennett* case.

The proposed new contract contains no such provisions. The test of compliance appears on the face of the contract and is not subject to the Administrator's discretion. Wage rates and hours and conditions of employment are fixed in advance. The provisions of the contract may not be changed except by mutual consent. There is no control over the details of construction, nor any right to inspect at will. Plans and specifications must be approved in advance by the Government only for the purpose of determining whether the project will be constructed in such a manner as to comply with the terms of the Acts of Congress. After the plans and specifications are approved, they may not be changed except by mutual consent. At the time the contract is signed the city knows exactly what obligations it is undertaking. In signing, the city exercises its discretion. It does not delegate it.

The new contract eliminates all those provisions objected to by the court in the *Kennett* case. It expressly provides that, once the Administrator has approved the plans and specifications and a certificate of purposes (setting out in detail the amounts and purposes of the expenditures which the city proposes to make in connection with the project) funds must be advanced by the Administrator on any requisition accompanied by a signed certificate

showing that the funds are to be expended in accordance with the plans and specifications and the certificate of purposes theretofore approved. Included in clause 11 of the new contract, is Paragraph (e), which provides that the project will be constructed in accordance with the provisions of an attached "Exhibit A", and that the provisions of Exhibit A will be incorporated by the city in all contracts (except sub-contracts) which it makes for the construction of the project. The provisions, found in Exhibit A, set forth wage rates and hours and conditions of employment. By the terms of the new contract, therefore, the city agrees, once and for all, in the exercise of its lawful discretion, that it will in its contracts with contractors provide for certain wage rates, hours, and conditions of employment, but the Administrator reserves no right whatsoever to interfere with or alter or modify those provisions, or to supervise their performance. The city, having once and for all accepted those provisions of the contract, is bound thereby, of course; but there is nothing in the contract which requires the city to do anything either in initially accepting those provisions of the contract or thereafter, which would constitute an abdication of its own judgment or submission to the judgment or discretion of the Administrator.

Specifically, the following additional changes have been made:

The provision of Paragraph 3, Part I, that the determination by the Administrator of the cost of labor and materials employed upon the project shall be conclusive, has been eliminated.

The provision of Paragraph 5, Part I, that each requisition shall be accompanied by such documents as may be requested by the Administrator has been eliminated. The new contract obligates the Government to honor requisitions if the papers supporting same are complete.

The provision in Paragraph 6, Part I, that the requisition must be satisfactory in form and substance to the Administrator, and that the amount of payments to be made pursuant thereto shall be determined in each instance by the Administrator, and that the payments will be made at such place or places as the Administrator may designate, have been eliminated, as has the provision that the Government shall be under no obligation to take up and pay for bonds beyond the amount which, in the judgment of the Administrator, is needed to complete the project. The new agreement itself fixes the amount of money to be paid by the Government. Similar language in Paragraphs 7, 8, and 9 of Part I, reserving to the discretion of the Administrator the determination of the time and amount of payment, is eliminated.

The provision of Paragraph 10 of Part I of the old proposed contract that all moneys received by the city shall be deposited in a bank or banks

which shall be satisfactory to the Administrator has been changed to provide that the money shall be deposited in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation.

Paragraph 13 of Part I of the old proposed agreement specifying that the project shall be constructed in accordance with plans, drawings, specifications, and construction contracts which shall be satisfactory to the Administrator, and under such engineering supervision and inspection as the Administrator shall require, has been eliminated; the agreement now makes it a condition precedent to payment of funds by the Government that plans and specifications shall be filed with, and once and for all accepted by the Government for the purpose of showing that the applicant will comply in all respects with the terms of Title II of the National Industrial Recovery Act. There is no control over the letting of construction contracts, and the right of inspection and supervision of the work is reserved to the city. The provision that no materials or equipment shall be purchased subject to any chattel mortgage, conditional sale, or title retention agreement, has been eliminated. There is also eliminated the provision of Paragraph 20 of the old agreement that the Borrower will take such steps as may be necessary to validate the bonds.

Paragraph 21, Part I, of the old proposed contract providing that the project shall never be

named except with the written consent of the Administrator, has been changed to provide that the project shall not be named for any living person.

Paragraph 22, Part I, of the old proposed contract, giving the Administrator the right to cancel the agreement for undue delay, is eliminated. Similarly eliminated are the provisions giving the Administrator the right to cancel the agreement if he shall not be satisfied that the city has complied in all respects with the terms of the agreement, if he shall not be satisfied as to the legality of the bonds, if any document submitted by the city shall be found to be incorrect or incomplete in any respect, if he shall not be satisfied as to the maturities of the remaining bonds, and if the Borrower shall not be able to prove to the satisfaction of the State Engineer that the proposed source of water supply is suitable, both as to quality and quantity of water, and that it is necessary and desirable to abandon the present use of water from Lake Coeur d'Alene. The condition that the Borrower must furnish evidence to the satisfaction of the Administrator that the Washington Water Power Company can be required to furnish water and electric service to the people of the city until the project has been completed, has been eliminated from the agreement.

Paragraph 1 of Part II of the old proposed contract provided that all work on the project shall be done subject to the rules and regulations adopted

by the Administrator to carry out the purposes and control the administration of the Act, but the old contract was so worded that it gave the Administrator the right (a) to alter those rules and regulations (even after the contract with the city was executed), and (b) to supervise their performance. The new proposed contract makes a fundamental change in this respect. It provides in clause 11 (e), that the project will be constructed in accordance with the provisions of an attached "Exhibit A", and that the provisions of Exhibit A will be incorporated by the city in all contracts (except sub-contracts) which the city makes for the construction of the project. Exhibit A sets forth hours and conditions of employment, and provides that wage rates, which must be predetermined in accordance with the provisions of the law of Idaho or of local custom, shall be inserted in all construction contracts. The Administrator reserves no right whatsoever to interfere with or alter or modify those provisions or to supervise their performance.

Paragraph 2 (g) of Part II of the old contract providing that the Board of Labor Review shall hear all labor issues arising under the contract is eliminated, as is the provision of Paragraph 2 (h), that the minimum wage rates established shall be subject to change by the Administrator. The requirement that certain provisions of Title I of the National Industrial Recovery Act shall be observed is eliminated, as is the provision that compensa-

tion insurance shall be satisfactory to the Administrator. The new proposed contract provides that compensation insurance and public liability and property damage insurance in amounts sufficient to provide the necessary coverage shall be maintained. The provision giving the Administrator the right to inspect all work as it progresses, and all payrolls, records of personnel, invoices of materials, etc., is eliminated, as is the provision that all reasonable rules and regulations which the Public Works Administration may prescribe shall be observed in the performance of the work. The provision that no bids shall be received from any sub-contractor who has not signed U. S. Government Form No. P. W. A. 61, has been eliminated. The provision giving the Administrator certain powers with respect to the termination of the construction contract for breach thereof, has been changed so as to vest all power in this respect in the city.

2. OPINION OF CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT IN THE GREENWOOD COUNTY CASE

United States Circuit Court of Appeals, Fourth Circuit

No. 4003

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND L. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS,

versus

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, APPELLEES

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville

Argued January 8, 1936. Decided February 22, 1936

Before PARKER, NORTHCOTT, and SOPER, Circuit Judges

W. H. Nicholson and D. W. Robinson, Jr. (R. F. Davis and Robinson & Robinson on brief), for Appellants, Greenwood County and its Finance Board; Alexander Holtzoff, Special Assistant to the Attorney General, and Jerome N. Frank, Counsel for the Federal Emergency Administrator of Public Works (James W. Morris, Assistant Attor-

ney General, and John W. Scott, Special Assistant to the Attorney General, on brief) for Appellant, Harold L. Ickes as Federal Emergency Administrator of Public Works; and W. S. O'B. Robinson, Jr., and Newton D. Baker (W. R. Perkins, H. J. Haynsworth, J. H. Marion, and W. B. McGuire, Jr., on brief) for Appellees.

PARKER, *Circuit Judge:* This is an appeal in a suit which was instituted by the Duke Power Company and its subsidiary corporation, the Southern Public Utilities Company, against the South Carolina County of Greenwood and the members of its finance board, to enjoin them for constructing an electric power plant at Buzzard Roost on the Saluda River, and from obtaining a loan and grant from the Federal Public Works Administration for the purpose of constructing it. Harold L. Ickes, as Federal Administrator of Public Works, was permitted to intervene and file answer as a defendant. The bill of complaint, as subsequently amended, asked injunctive relief on the following grounds: (1) that the project could not be constructed within the limits of the proposed loan and grant of $2,852,000.00 and would not earn sufficient revenue to be self liquidating, as required of projects to be financed by the Public Works Administration; (2) that the construction and operation of the power plant for the production and sale of electric current in large part to persons and corporations wtihout the limits of Greenwood County was beyond the county's powers and would subject

plaintiffs to competition based upon illegal and ultra vires activities on the part of the county; (3) that the proposed power plant was a purely local project, not connected with interest to commerce, and that, if the Act of Congress under which the Administrator was acting in agreeing to make the loan and grant (Title II of the National Industrial Recovery Act) should be construed as authorizing the loan or grant for such a project, the Act was to that extent invalid in that it exceeded the constitutional limits of congressional power; (4) that the Act was invalid in that it attempted to delegate legislative power to officials of the executive department of the government; and (5) that, in agreeing to make the loan and grant in question, the Administrator was exceeding his lawful authority and was engaged in an attempt to regulate intrastate power rates in derogation of the reserved rights of the states.

A motion by defendants to dismiss the bill was denied (see *Duke Power Co. et al.* v. *Greenwood County,* 10 Fed. Supp. 854); and the case was then heard on the merits and much evidence was taken relative to the first of the grounds upon which injunction was asked. The District Judge held that there was substantial evidence to support the finding of the Administrator that the project could be constructed within the limits of the loan and grant and would be self liquidating and that his conclusion with regard thereto was binding upon the courts. (See 12 Fed. Supp. 71.) He held also that

he was bound by the decision of the Supreme Court of South Carolina in the case of *Park* v. *Greenwood County,* 174 S. C. 35, 176 S. E. 870, as to the power of Greenwood County to issue the bonds and enter upon the project in question, not upon the principle of res adjudicata, but because the decisions of the highest court of a state are binding in the interpretation of its constitution and statutes. (See 10 Fed. Supp. 859.) He found, however, that the rates which the county power plant would charge would be substantially less than those charged by the plaintiffs; that it was the policy of the Administrator in making loans and grants to municipally owned power projects to require that the enterprise so aided establish rates lower than competing private companies and thus bring about a reduction of their rates; that the contract between the Administrator and the county stipulated as a condition of the loan and grant that the county should adopt a resolution satisfactory to the Administrator providing for the rates to be charged; and that the business of plaintiffs in the territory to be served by the plant of the county would be seriously and permanently injured by the erection of that plant and the competition which would result therefrom. (See 10 Fed. Supp. 857 and 858 as approved in 12 Fed. Supp. at 71 and 72.) He held that, because of the threat to their business which would result from this competition, plaintiffs had a standing in court to question the validity

of the Act under which the loan and grant were to be made, and that that Act was unconstitutional, both because it was beyond the power of Congress, whether measured by the commerce clause or the general welfare clause, and because it delegated legislative power to the executive. See 12 Fed. Supp. at 72 and 73. Injunction was accordingly granted restraining the defendants from carrying out their grant and loan agreement of December 8, 1934, restraining the Administrator of Public Works from paying over to Greenwood County or its officers any funds of the federal government for the purpose of constructing or operating the Buzzard Roost project, and restraining the county and its officers from receiving federal funds for that purpose. From this decree defendants appealed to this court and docketed their appeal as case No. 3971, the record in which should be considered as a part of the record on the appeal before us.

On November 30, 1935, shortly before the appeal in No. 3971 was to be heard in this court, a contract was executed between the Administrator and the county abrogating the contract of December 8, 1934, and prescribing new terms and conditions for the making of the loan and grant, but not changing the amount of either of them. This contract eliminated those provisions of the old contract which had been held ultra vires the powers of a municipal corporation in *Arkansas-Missouri Power Co.* v. *City of Kennett, Mo.* (C. C. A. 8th), 78 Fed. (2d) 911, and

also the provisions of the old contract which had been held by the court below to give the Administrator control over the rates to be charged by the county. A new provision designed to eliminate any contention that the loan and grant were made upon conditions not embodied in the contract was inserted in the following language:

> 13. This agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the applicant and the government or any of its agencies in any way relating to said project.

Under the terms of this contract the Administrator retained no control over the work to be done; but it was specified that certain conditions as to wages, hours of work, employment of convict labor, collective bargaining, etc., should be observed by the county and by contractors and subcontractors on the project.

Upon the contract of November 30, 1935, being called to our attention, we immediately remanded the case to the court below to the end that that court might reconsider its decision in the light of the contract and take such further action as might be appropriate. This was done because in our opinion there was probability that the case had been rendered moot, at least as to some of the

questions involved, by the execution of the new contract; and we thought that, in view of the changed situation, the lower court should be revested with jurisdiction of the entire cause with power to enter such decree as might be deemed appropriate.[1] A hearing was thereupon had in the court below at which the new contract was introduced in evidence and the testimony of the Federal Administrator of Public Works and the officers of the county was taken with reference thereto. The court excluded a part of the testimony of the Administrator which we think should have been admitted, in view of the contention that his action in approving the loan and grant to the county was for the purpose of affecting power rates; but, as the testimony excluded as well as that admitted has been certified in the record and is before us, no harm has resulted from this action.

The Administrator, on this hearing, denied that he intended to exercise any control whatever over the rates to be charged by the county and stated that

[1] That the lower court may be thus revested with jurisdiction of the cause after the expiration of the term at which the decree appealed from was entered, in order that it may give consideration to some phase of the case which it has overlooked or may take into consideration matters which have occurred since the taking of the appeal, is too clear for discussion. See *U. S.* v. *Anchor Coal Co.*, 279 U. S. 812; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 171, 172; *Wyant* v. *Caldwell* (C. C. A. 4th), 67 Fed. (2d) 372; *Finefrock* v. *Kenova Mine Car. Co.* (C. C. A. 4th), 22 Fed. (2d) 627.

the loan and grant were made pursuant to the fundamental purpose of the Public Works Administration "to relieve unemployment and increase purchasing power through the construction of useful public works", and that the interest of the Public Works Administration in the question of competitive rates went merely to the question as to whether or not the rates to be charged would repay the loan made by the administration within the time limit of the contract. Specifically, with reference to the loan to Greenwood County, he testified:

> We did not approve rates. We are not interested in rates except in so far as our experts advised us that by charging those rates at which power could be sold they could liquidate their obligation to us. The rates set out in the bond resolution of the county are initial rates. There is no reservation of the right on our part to change those rates in the future. I don't know whether the contracts which Greenwood County made for the sale of power to be produced by the project were presented to anyone in the Public Works Administration or not. They were not presented to me personally. Our experts advised us that at that rate our loan would be liquidated. It was the same interest any banker would have in buying these bonds. We would not have entered into a contract if the rates had not shown a sufficient, prospective income, based on those rates to liquidate the loan. The rates as such were not approved by the P. W. A. authorities. We

knew that those rates were sufficient. If the rate were a lower rate applied to a larger sale of power which would have been sufficient in the aggregate to liquidate the obligation to the United States that would have been a satisfactory arrangement. On the other hand, if it had been a higher rate, applied to a lesser amount of power sold which would yield enough to liquidate the obligation of the United States that would have been a satisfactory arrangement. We did not take into consideration the rates charged by the Duke Power Company in making this contract.

And at another place he said:

Q. In the case of the Greenwood County project, you would have made the loan and grant, regardless of your views as to whether the Duke Power Company's rates were, or were not, high?—A. We would have made the loan and grant to Greenwood County, regardless of the rates, or our opinion of the rates, of the Duke Power Company, if Greenwood County had the legal authority to enter into the contract with us, and if Greenwood County could satisfy us that it could liquidate the loan that we made. Those were the considerations.

He further testified that the statement of one C. E. Rose at the former hearing as to the policy of the Public Works Administration was not correct. The pertinent portion of Mr. Rose's testimony on the former hearing is as follows:

> The Duke Power Company will be the only competitor of the Buzzard Roost project, so we estimated a rate schedule for the project which would yield 6.5 mills for the industrial consumers of good load capacity, and 8.2 mills as a municipal rate, both of which are under the Duke rates. The Duke rates do not meet with the approval of the P. W. A. authorities. We think they are excessive, and it is because we think they are excessive that the P. W. A. approved this grant. That is one of the reasons for the approval of the grant. As to whether, if the Duke rates had met with the approval of the P. W. A. authorities the loan and grant would have been approved, I can say that we (meaning P. W. A.) have never approved a project where a privately owned company has made a satisfactory adjustment. That doesn't mean we will not. It is the policy of the P. W. A. not to approve loans and grants where privately owned utilities have reduced their rates satisfactory to the P. W. A., and it was in line with that policy and because of that policy that I made the investigation as to the Duke rates.

The judge below, after hearing this evidence and considering the new contract, held that there was nothing which called for a modification of his former findings and that "whatever might be the purpose, policies, and practices of the Public Works Administration in reference to competitors, in financing the instant enterprise the result to the plaintiffs

would be the same. The lower rates which the enterprise may be able to charge because of government aid through its loan and grant—particularly the latter—would effectively establish a 'yardstick' or a rate of charge which plaintiffs must inevitably meet, or have their business pro tanto destroyed." A decree was entered, therefore, continuing the injunction theretofore granted and making it applicable to the new contract; and from that decree the defendants again appealed.

There can be no question as to the correctness of the holding of the trial judge that he was bound by the finding of the Administrator of Public Works to the effect that the project could be constructed within the limits of the loan and grant and would be a self liquidating project within the meaning of the act of Congress and the policy of the Public Works Administration. That the presumption of correctness attaches to the action of administrative officers with respect to matters committed to their discretion, and that, even where judicial review is provided for, the exercise of such discretion will not be disturbed if based upon substantial testimony and not manifestly arbitrary and unreasonable, is too well settled to admit of discussion. And it is equally clear that we are bound by the decision of the South Carolina Supreme Court in *Park* v. *Greenwood County,* 174 S. C. 35, 176 S. E. 870, to the effect that the construction of the power plant and the issuance of revenue bonds to pay for same,

as contemplated by the contract with the Administrator of Public Works, was within the powers of Greenwood County.[2] The questions upon this appeal, therefore, are narrowed to three, viz: (1) Is the Act of Congress under which the loan and grant are to be made a valid and constitutional enactment? (2) Will the action of the Administrator of Public Works in making the loan and grant be a valid exercise of power under the Act? And (3) are the plaintiffs in position to ask an injunction in any event?

1. The Constitutionality of the Statute

The statute under which the Administrator is acting in making the loan and grant to Greenwood County is Title II of the National Industrial Recovery Act, 48 Stat. 200, under which $3,300,000,000 was appropriated by the Congress for the purpose of relieving unemployment through the country. Section 201 of that title authorizes the President to create a Federal Emergency Administration of Public Works, all of the powers of which shall be exercised by an "Administrator" to be appointed by the President. Section 202 provides (48 Stat. 201):

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[2] See also the later decision of *Clarke* v. *South Carolina Public Service Authority*, S. C. , 181 S. E. 481, which holds, in addition, that neither the South Carolina statute nor the contract with the Administrator of Public Works is to be condemned as an unconstitutional delegation of legislative authority to the lending agency.

The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control * * *; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; * * *.

Section 203 provides:

> (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase * * *; Provided, That in deciding to extend any aid or grant hereunder to any state, county, or municipality the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend

to public works in the several states, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

Section 206 provides:

All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed; Pro-

> vided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

We think that the enactment of these provisions of the statute was well within the power of Congress. It may be conceded that, under ordinary circumstances, the power would not exist to raise and expend funds for constructions local in character and not connected with the exercise of any of the powers of regulation expressly conferred upon the federal government; but the circumstances under which this statute was enacted were by no means ordinary and the construction contemplated was not of isolated projects but of a vast program of public works intended to relieve a condition of unemployment which was nation wide in scope and had become a menace, not merely to the safety, morals, health, and general welfare of vast numbers of the people, but also to the stability of the government itself. As was well said by Judge Otis in *Missouri Utilities Co.* v. *City of California,* 8 Fed. Supp. 454, 458:

> Those who have studied the history of the world as well as those who are familiar only with contemporaneous events throughout the world know that the existence of a nation may be imperiled by foreign aggression not

only, by civil wars not only; it may be imperiled, it may be destroyed utterly, by the unreasoning rage of masses, a rage aroused by hunger, by want in every form, by a sense of injustice, a rage stirred up alike by sincere and honest, as well as by villainous leaders. It is a rage which does not analyze, which does not discriminate. It is not content with driving the money changers from the temple; it destroys the temple itself. Everyone should know that in general economic distress is possibility of grave danger to the established order. The political branches of government, that is, the executive and legislative branches, must guard and protect the national existence, if it is to be done at all, and that they can do only through the enactment and enforcement of laws. It is for them to decide whether a situation has arisen which endangers the existence or general welfare of the nation; it is for them to decide what measures shall be taken to avert dangers arising from that situation. With these decisions or their wisdom, courts and judges have nothing to do save only in that case in which it has most clearly been demonstrated that the political branches of government not only have usurped power not granted them by the Constitution, but in so doing directly have injured a litigant who has come to the courts for relief.

In the light of our history, it is idle to say that, in the presence of such a situation as confronted Congress, the national government must stand by

and do nothing for the relief of the general distress, confining its activities to matters as to which it is given legislative powers by the Constitution. It is the only instrumentality which the people of the country have which can deal adequately with an economic crisis nationwide in scope; and there can be no question but that, for the purpose of dealing with such a crisis, it can exercise the power to raise and spend money under Article 1, Section 8, Clause 1 of the Constitution which provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.

There has been much discussion as to the meaning of this "General Welfare" clause of the Constitution; but it is now definitely settled that the power of Congress to authorize expenditure of public money for public purposes is not limited by the direct grants of legislative power contained in the Constitution. Dealing with this question in the recent case of *United States* v. *Butler,* — U. S. —, 56 S. Ct. 312, the Supreme Court, speaking through Mr. Justice Roberts, said:

> Since the foundation of the nation sharp differences of opinion have persisted as to the true interpretation of the phrase. Madison asserted it amounted to no more than a reference to the other powers enumerated in the subsequent clauses of the same sec-

tion; that, as the United States is a government of limited and enumerated powers, the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress. In this view the phrase is mere tautology, for taxation and appropriation are or may be necessary incidents of the exercise of any of the enumerated legislative powers. Hamilton, on the other hand, maintained the clause confers a power separate and distinct from those later enumerated, is not restricted in meaning by the grant of them, and Congress consequently has a substantive power to tax and to appropriate, limited only by the requirement that it shall be exercised to provide for the general welfare of the United States. Each contention has had the support of those whose views are entitled to weight. This court has noticed the question, but has never found it necessary to decide which is the true construction. Mr. Justice Story, in his Commentaries, espouses the Hamiltonian position. We shall not review the writings of public men and commentators or discuss the legislative practice. Study of all these leads us to conclude that the reading advocated by Mr. Justice Story is the correct one. While, therefore, the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of section 8 which bestow and define the legislative powers of the Congress. It results that the

power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.

If it be conceded, as we think it must be, that the expenditure of public funds for the relief of nation-wide unemployment is within the power of Congress, as being an expenditure in furtherance of the general welfare of the United States, we think that it necessarily follows that expenditures for a nation-wide program of public works for the purpose of providing employment in such an emergency is within the Congressional power; for from the earliest period of history nations have been accustomed to resort to the construction of public works as a means of relieving the unemployment of their people. Certainly, it is hard to imagine any expenditure which the federal government might make for the purpose of relieving the danger and distress arising from unemployment which would interfere so little with private business, and would have so little tendency to create a dependent attitude on the part of the people, as a program of public works. And, not only does such a program relieve unemployment by furnishing work in the construction of the immediate projects and in the manufacture of materials to be used therein, but it also makes a lasting contribution to the national wealth, and thus counterbalances to some extent the burden of the

increase in the national debt which it entails. If, therefore, the relief of nationwide unemployment be a legitimate end for Congress to have in view in the exercise of its power to raise and spend money under "General Welfare" clause, the construction of a nationwide program of public works would seem to be a legitimate means to that end.

And we do not think that it can be said that Congress is invading the reserved powers of the states, or is making expenditures for matters essentially local in character, merely because the project for which expenditure is made is not connected with interstate commerce and, when considered alone is local in character. It cannot be said to invade the reserved powers of a state to make loans or grants of money to municipal corporations which the state continues to control, and which are at liberty to reject the loans and grants if they see fit to do so. And a program of works for relieving nationwide unemployment does not lose its national character and become local merely because each of the public works projects is constructed in some particular locality. If this were true, the spending power under the general welfare clause would be limited, in the manner in which the Supreme Court has just held in *United States* v. *Butler* that it is not limited, to objects embraced within the direct grants of legislative power. No matter how clearly national the end to be attained by expenditures under the general welfare clause, or how appropriate

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the means adopted for the attainment of that end, each individual expenditure must needs have a local as well as a national character; for money cannot be expended in vacuo and no project can be imagined, even though part of a national program, which will not have a local situs. The national character of the program here involved is shown, however, by the fact that projects of various kinds have been commenced in 3,040 of the 3,070 counties of the country; and the magnitude of the undertaking clearly appears from the report of the Administrator to the Senate, of March 22, 1934. See Senate Document No. 167, 73rd Congress, 2nd Session; *Kansas Gas & Electric Co.* v. *City of Independence, Kan.* (C. C. A. 10th), 79 Fed. (2d) 32, 42; id. 79 Fed. (2d) 638; *Missouri Utilities Co.* v. *City of California,* 8 Fed. Supp. 454, 464; *Iowa Southern Utilities Co.* v. *Town of Lamoni,* 11 Fed. Supp. 581.

Nor do we think that the pertinent portion of the Act can be condemned as an unconstitutional delegation of legislative power within the rule laid down in *Panama Refining Co.* v. *Ryan,* 293 U. S. 388; and *L. A. Schecter Poultry Corporation* v. *United States,* 295 U. S. 495. It was out of the question for Congress to prescribe the details of an extended program of public works. It appropriated the money for the purpose, laid down the principles which were to guide the President and the Administrator of Public Works in its expenditure,

and left to them the working out of the details. The making of loans and grants in carrying out the policy thus laid down by Congress is the exercise of administrative, not legislative, discretion. As said in *Wilmington & Zanesville Railroad Co.* v. *Commissioner,* 1 Ohio St. 77, 88, and quoted with approval by the Supreme Court in *Hampton & Co.* v. *United States,* 276 U. S. 394, 407:

> The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.

The question was fully considered by the Circuit Court of Appeals of the Tenth Circuit in *Kansas Gas & Electric Co.* v. *City of Independence,* supra; and, on the point here under consideration, we are in thorough accord with what was said by Judge Phillips in that case. He said:

> Section 202 (40 U. S. C. A. 402) lays down a standard as to the program of public works. It provides the program must be comprehensive and must include certain specified classes. Manifestly the Congress could not enumerate specifically the particular projects to be included in such a broad program.
>
> We are not called upon to decide whether the Congress could delegate to the President power to include in such program other

classes of projects than those enumerated in section 202, because the project here involved falls within a specifically enumerated class.

Sections 203 and 206 (40 U. S. C. A. 403, 406) lay down standards as to what projects may be financed or aided by loans or grants. They must be public works projects; they must be projects included in the program; they must come within the limitations specified in section 206; a loan or grant must be made with a view to increasing employment quickly, and a loan must be reasonably secured.

The making of such a loan or grant is administrative rather than legislative in character.

* * * * *

We conclude the Congress at least as to the classes of projects specifically enumerated, lays down a legislative standard and declares a legislative policy with requisite definiteness, and impliedly directs the President to effectuate the purposes of the Act and to make loans and grants, within the limits of a reasonable administrative discretion, to projects that fall within the classes enumerated in section 202 and the limitations of Sections 203 and 206, and that, while Title 2 grants broad administrative authority and discretion, it does not unconstitutionally delegate legislative power.

See also *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266; *Union Bridge Co.* v. *United States,*

204 U. S. 364; *United States* v. *Hanson* (C. C. A. 9th), 167 Fed. 881.

2. The Exercise of Power by the Administrator

As the statute is valid, the making of the loan and grant by the Administrator is valid if within its terms notwithstanding the motive of the Administrator in making them. As said by Judge Sibley in his concurring opinion in *Tennessee Valley Authority* v. *Ashwander* (C. C. A. 5th), 78 Fed. (2d) 578, 583, "This case is not to be decided by the purposes and plans of the Board, but by the validity of what is about to be done under the attacked contracts." See also *Spalding* v. *Dickinson,* 161 U. S. 483, 498, 499; *West* v. *Hitchcock,* 205 U. S. 80, 85, 86.

It is of course true that, as Congress may not encroach upon the reserved powers of the states, officers acting under its authority may not so encroach; and the authority of such officers in administering acts of Congress must be held to be limited by the bounds of Congressional power. The administrator, for example, could not, under the guise of carrying out the public works program, make such an expenditure of public funds as would interfere with the states in the exercise of their reserve powers. See *U. S.* v. *Butler, supra.* But we do not understand that any such thing is being done here. Greenwood County is but an agency of the state of South Carolina and remains subject to the control of that state in the management of its

power project as well as in other matters. The rates to be charged by public utilities remain subject to state control. All that the Administrator proposes to do is to make a loan and grant to the county to enable it to engage in an enterprise which, as a subdivision of the state, it has been given by the state the right and power to engage in. In other words, the Administrator's action will not in any sense limit the powers of the state but will furnish to the state means of exercising a power which it already possesses, i. e., the power of engaging in a public business for the benefit of its citizens. We are unable to see how lending or giving money to a state agency for such purpose can be said to be an encroachment on state power. It is an entirely different thing from giving or lending money to private persons for the purpose of defeating a state policy or regulating matters under state control.

The learned judge below was of opinion that the action of the Administrator should be condemned because the county would be enabled by the loan and grant to establish an enterprise which could and would charge lower rates than plaintiffs were charging and thus constitute a "yardstick" by which plaintiffs' rates would be affected. We cannot see, however, that the incidental effect which the construction of the county project may have on plaintiffs' rates has any bearing on the question. The county has the right to engage in the enter-

prise notwithstanding the effect of its competition upon the business of plaintiffs. *Puget Sound Co.* v. *Seattle*, 291 U. S. 619; *Madera Water Works* v. *Madera,* 228 U. S. 254. And notwithstanding that the loan and grant to establish the enterprise are made by the Administrator, the fact remains that the business is its business and subject to its control. If a "yardstick" is established, it is the county's yardstick subject to the control of the state, not of the federal government.

It is argued, however, that the purpose of the Administrator in making the loan and grant is to affect the rates of the plaintiffs; that the policy of the Public Works Administration is to make loans and grants in such way as to bring about a reduction in public utility rates; and that they are not made except where the rates to be charged by the municipal enterprise which is being aided will be lower than the rates of the competing private company. To support this contention plaintiffs rely upon the testimony of C. L. Rose heretofore quoted and also a press release, referred to by the judge below in his findings of fact, as well as to certain statements made by the Administrator in his recently published book entitled "Back to Work." The Administrator denies under oath, however, that his policy in making loans and grants arises out of any purpose to affect rates, and specifically that the contract here in question was made with such end in view; and we feel that we would not be

justified in disregarding the sworn testimony of a Cabinet Officer as to the policies which are being followed by him in the discharge of his official duties, and accepting instead mere press reports or the conflicting testimony of a minor official who may not have understood the purposes of his superior, who was the one charged with the formulation of policies and the exercise of discretion.

It is true that in the book of the Administrator, just as in the press release, there are statements to the effect that the Public Works Administration had endeavored in the approval of loans to make electric energy more broadly available at cheaper rates, and that it was its practice before approving loans to give private companies an opportunity to put in effect rates as low as those at which the municipal system would be self-liquidating; but it is manifest that it is only where the new municipal enterprise will be able to furnish lower rates than the competing private companies that there is reasonable hope of their securing sufficient business to be self liquidating projects. Loans to such enterprises would be unsound from an economic standpoint if they should be made in cases where the rates to be charged would be as high as those of existing enterprises or where the latter might lower their rates to such an extent that the municipal enterprises could not secure sufficient business to be self liquidating.

The fact, however, that the Administrator may or may not be furthering his ideas as to lowering power rates or encouraging municipal ownership, would seem to have no bearing on the point under consideration, if what he is doing is in fact required by a sound financial policy in the discharge of his duties under the statute; for, as stated above, his action may not be enjoined because of his motives, if he has been given the power by a valid act of Congress to do what he is doing. The discretion as to what loans and grants shall be approved has been vested in him, not in the courts; and the courts may not interfere with the exercise of that discretion because they may not approve of the reasoning upon which it is based.

It must be remembered that this is not a case where Congress is directly or indirectly attempting to regulate intrastate power rates. The aim of Congress is to relieve unemployment through a nationwide program of public works, one feature of which is loans and grants to states or municipalities to aid them in such public works as development of water power and the transmission of electrical energy. Such loans and grants cannot be made except in cases where the states or municipalities desire to undertake these public works, a matter which is left entirely to their decision; and, if the making of such loans and grants inevitably results, as has been suggested, in more abun-

dant power at lower rates, this is but the incidental effect of what the states or their agencies voluntarily decide to do. Without suggesting that this incidental effect of more abundant power at lower rates might be considered as conducive to the general welfare, we see no reason why a loan or grant to a municipality which will aid in the relief of unemployment must be condemned because of it. That the Administrator may have had such result in mind in approving loans and grants would seem to furnish no more ground for interference by the courts than the fact that a purchasing agent, for the government might have purchased a post office site, otherwise desirable, because the location harmonized with his ideas of a proper place for the post office in considering the proper development of the city. In other words, we do not think that the exercise of a discretion vested in a federal officer by a valid act of Congress may be condemned by the courts, either as transcending the power of such officer or as an abuse of discretion, merely because some consideration of what was locally desirable may have entered into its exercise.

And we think that there is no merit in the contention that the Administrator has assumed control over a local matter reserved to the jurisdiction of the states, because of the provisions of the contract as to wages, hours of labor, etc. These are stipulated by contract in advance, not left to the control of the Administrator during the progress of the

work. Had this been done, there is no reason to think that it would be violative of any provision of the laws of South Carolina. *Clarke* v. *Public Service Authority,* — S. C. —, 181 S. E. 481. But, as it was not done, we see no ground of complaint on any score. Certainly where the federal government is making a loan to aid in the relief of unemployment, it may stipulate that the loan shall be used in such way as will best accomplish that purpose.

3. Right of Plaintiffs to Injunction

For the reasons heretofore stated, the plaintiffs are not entitled to an injunction; but, even if the statute were unconstitutional or the action of the Administrator unauthorized, they would not be entitled to the injunction which they ask, for the reason that no legal right of theirs is infringed by any proposed action of the county or the Commissioner of Public Works. The county, in its proposed action, will not infringe any such right; for it is thoroughly settled that competition by a county or municipality violates no right of a public service corporation doing business therein which, as is the case of plaintiffs here, has no exclusive franchise. *Puget Sound Co.* v. *Seattle,* 291 U. S. 619; *Madera Water Works* v. *Madera,* 228 U. S. 454. The administrator will not infringe any such right in making the loan and grant to the county from funds of the United States; for it is equally well settled that no citizen or taxpayer has any such right in funds

of the government. *Frothingham* v. *Mellon,* 262 U. S. 447. In the case just cited the Supreme Court, after referring to taxpayers' suits to enjoin an illegal use of money by a municipal corporation, said:

> But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

As the county infringes no right of plaintiffs by entering into competition with them, and as the Administrator infringes no right of theirs in making loans or grants of public funds, it would seem to follow necessarily that no such right is infringed when the Administrator makes a loan and grant to the county in order that the county may engage in competition, for the addition of negative quantities can never result in a quantity that is positive. The exact question was before the Circuit Court of Appeals of the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *City of Kennett, Mo.* (C. C. A. 8th) 78 Fed. (2d) 911, and we see no answer to what was said by Judge Sanborn, speaking for the court, in that case. Said he:

The court below was of the opinion that the power company was in no position to question the power of the federal government to loan or give money to the city of Kennett. We are in accord. The United States is not proposing to become a competitor of the power company. It will have no right, title, or interest in the plant when completed and nothing to do with operating it. The destruction of the power company's property will come about by reason of the city's operation of the plant when erected. The position of the United States is that of a lender of money, a buyer of bonds, and a giver of gifts. True, the money procured from the government will enable the city to build the plant, and, if the city builds the plant, it will no doubt operate it, and when it does operate the plant the city will take the customers of the power company, and the company's property in Kennett will become worthless or greatly impaired in value. We know of no rule of law, however, which permits one indirectly hurt, no matter how seriously, by a government expenditure, to question the power of the government to make it. In fact, the rule is to the contrary. *Commonwealth of Massachusetts* v. *Mellon, Secretary of the Treasury et al.,* 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078; *city of Allegan, Mich.,* v. *Consumers' Power Co.* (C. C. A. 6th), 71 Fed. (2d) 477 (certiorari denied, 293 U. S. 586, 55 S. Ct. 100, 79 L. Ed. —). It is true that in the cases cited

> the plaintiffs relied upon their status as taxpayers exclusively, while in this case the plaintiff relies, in addition, upon the injury which will be done to its property by municipal competition. That injury, however, is, so far as the government is concerned, clearly consequential and indirect, as we have pointed out. See also *Missouri Utilities Co.* v. *City of California, Mo.,* et al. (D. C., W. D. Mo.) 8 Fed. Supp. 454, 465.

Another case directly in point is the case of *City of Allegan* v. *Consumers' Power Co.* (C. C. A. 6th) 71 Fed. (2d) 477 (Certiorari denied 293 U. S. 586) referred to by Judge Sanborn in the above quotation. That case, just as the case at bar, involved a grant and loan by the Administrator to a municipal corporation to construct an electric lighting plant which would compete with a private power company. The question of the constitutionality of Title II of the National Recovery Act was raised there as it is here; and the Circuit Court of Appeals of the Sixth Circuit held that the company was "without right to raise any question either as to the effect of or the constitutionality of the recovery act" in that suit. It is true that the injury which might result from municipal competition was not discussed in the opinion; but as pointed out above this would have added nothing to plaintiff's position, for the city had a right to engage in such competition and invasion of rights cannot be predicated of competition which is rightful.

The precise question as to whether one who will be injured by the competition of another has a standing in court to protest the action of an officer of the government, alleged to be unlawful, which will enable such other to compete with him, was raised in *United States* v. *Dern* (App. D. C.) 68 Fed. (2d) 773. That was a suit for mandamus to compel the Secretary of War to cancel certain leases of warehouses which were alleged to have been made contrary to law. Plaintiffs alleged that they were engaged in direct competition with the lessee, and that, by reason of the advantageous provisions of the allegedly illegal lease agreements, the lessee was able to underbid them in competing for business. It was held, however, that this gave plaintiffs no right to challenge the legality of the action of the Secretary of War in making the leases.

Another decision very much in point is *Railroad Co.* v. *Ellerman* 105 U. S. 166, wherein it was held that a right to question as ultra vires the acts of a railroad corporation did not arise because, as a result of these acts, competition for the business of complainant was created. The court said:

> The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If he asserts that the competition of the railroad company damages him, the answer is, that it does not abridge or impair any such right. If he alleges that the railroad com-

> pany is acting beyond the warrant of the law, the answer is, that a violation of its charter does not of itself injuriously affect any of his rights.

Applying this language to the case at bar, the only injury of which plaintiffs can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right. If they assert that the competition of the county will damage them, the answer is that it will not abridge or impair any such right. If they allege that the Administrator, in making the loan and grant, is acting beyond the warrant of the law, the answer is that such action does not of itself injuriously affect any of their rights.

The two cases upon which plaintiffs particularly reply with respect to their right to sue are *Pierce* v. *Society of Sisters,* 268 U. S. 510, and *Frost* v. *Corporation Commission,* 278 U. S. 515; but what has already been said is sufficient to distinguish both of these. In the *Pierce case,* a state statute, by requiring parents to send their children to public schools, threatened the destruction of the business of a private school by reason of the unlawful coercion exercised on its patrons. The injury threatened was, not from lawful competition, but from unlawful coercion of patrons; and this was what was enjoined. Here the only injury to plaintiffs that can arise is from the competition of the county, which is lawful. In the *Frost case,* the plaintiff was the holder of a license to operate a

cotton gin which the court held to be exclusive as against person not similarly licensed. The legislature attempted to grant a privilege to cooperative societies which was held void because violative of the equal protection clause of the 14th Amendment. It was held that the plaintiff was entitled to enjoin one who attempted to operate in competition with him under a void permit issued under the unconstitutional statute. The court said that the holder of a valid license might "resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property right." Here the operation of a power plant by the county is not illegal, and plaintiff has no right to exclude the county from any competition upon which it may see fit to enter.

To conclude, we think: (1) that the loan and grant which the Administrator of Public Works proposes to Greenwood County cannot be condemned either on the ground that the Act of Congress under which they will be made is unconstitutional or that the Administrator in making them will exceed his powers under the act; and (2) that, even if this were not true, no right of plaintiffs would be invaded either by the county in the building of the power project or by the Administrator in the making of the loan and grant. In a similar case, the Circuit Court of Appeals of the Tenth Circuit, in *Kansas Gas & Electric Co.* v. *City of Inde-*

pendence, (C. C. A. 10th) 79 Fed. (2d) ——, denied relief on the first of these grounds Circuit Court of Appeals of the Sixth and Eighth Circuits in *City of Allegan* v. *Consumers' Power Co.* (C. C. A. 6th) 71 Fed. (2d) 477, and *Arkansas-Missouri Power Co.* v. *City of Trenton* (C. C. A. 8th) 78 Fed. (2d) 911, 914, 924, denied relief on the second ground.

The question arises whether there should be a dismissal on the merits or for lack of jurisdiction. While the second ground above mentioned is frequently treated as going to the question of jurisdiction, it really goes to the right of plaintiff to relief rather than to the jurisdiction of the court to afford relief in a proper case. In addition to this, the pleadings ask relief, which as we have seen was properly denied, on grounds other than the unconstitutionality of the statute and lack of authority in the Administrator; and, as there was diversity of citizenship, the court had jurisdiction to pass on these matters. We think, therefore, that the decree appealed from should be reversed and that the lower court should be directed to dismiss the bill for lack of equity.

Reversed.

Soper, *Circuit Judge,* Dissenting: When the Federal Emergency Administrator of Public Works in the exercise of his authority under the statute decided to make the loan and grant to Greenwood County, S. C., to be used in the construction of a hydroelectric plant on the Saluda

River, he intended not merely to effectuate the purpose of Title II of the Act to increase employment quickly, but also to reduce the cost of electric energy to the local community. The evidence shows quite clearly that he held the opinion that public utility companies have charged exorbitant prices, and that in particular the Duke Power Company and its subsidiary have exacted unreasonable rates; and that in order to bring down the rates for the benefit of the consumers it was desirable and proper that a portion of the great sum of money within his control should be used to establish municipal power projects in competition with privately owned public utilities.

When his authorized publications are considered it is difficult to reach any other conclusion. Thus in a press release of the Federal Emergency Administration of Public Works (P. W. A.) of September 24, 1934, he said:

> P. W. A. has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.
>
> However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as

low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to P. W. A. that the offer be accepted and the application withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain instances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

P. W. A. will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. P. W. A. will not rescind allotments or suggest the withdrawal of application until the lowered rates are legally in effect.

State laws authorize municipal competition, hence it is P. W. A.'s position that the state has determined that such competition may be socially desirable. We believe it is

> for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect.

In his testimony given in the pending case on December 21, 1935, the Administrator did not repudiate this statement but said that it was not a correct statement standing alone and must be understood as corrected by his testimony. A more detailed expression of his purposes as Administrator and his views upon the practices of public utility companies in general and of the Duke Power Company in particular is found in his story of P. W. A. told in his book Back to Work, May 16, 1935, chapter VI, cheap power, pp. 122 to 147, wherein reference to the Greenwood County project is made. He shows how the great federal power projects, such as Boulder Dam on the Colorado River, are the beginnings of a national plan designed to increase the supply of electric power and diminish its cost, and thus to put it within the reach of the under-privileged for many uses and raise the standard of living in their homes. With respect to municipal power projects established under P. W. A. he has this to say:

> By January of 1935, twelve municipal power projects had been completed. Forty-eight others were under construction; thirty-

four more had been approved by the power board, and about seventy-one were under consideration. The total amount allotted at that time for this purpose was $48,784,300.

One of the most important accomplishments of P. W. A., although an indirect one, has been a saving to consumers of millions of dollars through the lowering of rates by the private utilities to meet the charges proposed by applicants for public power projects. The rejection or withdrawal of some of the 200 applications that P. W. A. did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant.

These "yardsticks" provided by both municipal and federal enterprises are so valuable that they alone would warrant P. W. A.'s expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the federal projects have brought about rate adjustments over still larger expanses of territory.

How are these formal statements modified by his present testimony? To the extent that the government is interested in the rates to be charged by the county only as a bondholder and does not intend to exercise any control over them. He added that the loan and grant would have been made regardless of the rates of the Duke Power Company, if it were established that the county had legal authority to

make the contract and that the loan would be liquidated; but as this statement enters the realm of conjecture it adds little to the discussion.

One is presumed to intend the natural and probable consequences of his acts; and the public utterances of the Administrator show beyond possibility of debate that he realized that his loans and grants to municipal power projects would reduce local utility rates. The reduction of rates under the plan of P. W. A. in this case is not merely probable, it is inevitable. The municipality makes no investment and assumes no liability for the loan, for that is to be represented by revenue bonds payable only out of income of the plant. In addition 30% of the cost of the project is a free gift. We have thus to consider not merely the influence of a competitor who risks his own money in the enterprise. Competition from such a source the local utility company must endure without complaint. The fact is that the county, if not dowered with a free gift with which to build a plant, is at least given the unrestricted power to cut the rates, and must do so in order to secure the business and satisfy the demands of its citizens.

We may lay to one side the protests of the Power Company that the state authorities have found the rates of this intrastate industry to be fair and reasonable and the charges of the Administrator that the rates are exorbitant. The question is, has the federal government the constitutional right to

exert this regulatory power in a local field on the ground that it is only an incidental result of the laudable effort under the general welfare clause of the Constitution to put an end to unemployment. The conflict between state and federal power which arises is similar to that which the Supreme Court resolved in *U. S.* v. *Butler* in which it held that a statutory plan to regulate and control agricultural production effected by contracts between the government and the farmers was beyond its power and invaded the reserved rights of the states. The principle underlying that decision seems to control this case, and the factual differences between them do not appear to be material. The present contract does not in turn obligate the municipality to reduce the rates with the same directness as the farmers' contracts required to curtail production, but as a result of the P. W. A. contract the rates are bound to be reduced as we have seen. Moreover an element of coercion enters into the indirect reduction of the rates by the Power Company, which bears some analogy to the virtual compulsion under which the farmers' contracts were signed. The party to the present contract with the government is not a private citizen, but a municipality or agency of the state which consents to the invasion of the state's domain; but, it is submitted that the state no more than the individual may be induced by gift to break down the barriers which confine the federal government within con-

stitutional limits. In *U. S.* v. *Butler* the Court said:

> But it is said that there is a wide difference in another respect, between compulsory regulation of the local affairs of a state's citizens and the mere making of a contract relating to their conduct; that, if any state objects, it may declare the contract void and thus prevent those under the state's jurisdiction from complying with its terms. The argument is plainly fallacious. The United States can make the contract only if the federal power to tax and to appropriate reaches the subject matter of the contract. If this does reach the subject matter, its exertion cannot be displaced by state action. To say otherwise is to deny the supremacy of the laws of the United States; to make them subordinate to those of a State. This would reverse the cardinal principle embodied in the Constitution and subsitute one which declares that Congress may only effectively legislate as to matters within federal competence when the States do not dissent.

The conclusion is that Title II of the statute is invalid so far as it may be interpreted to authorize the making of such a contract as we have here; and that the action of the Administrator herein is beyond the scope of the power which may be conferred by Congress upon an officer of the federal government.

The power company has such an interest in the business as to justify its suit. The practical effect upon its valuable property interests is manifest. It has an interest far more weighty than that of a federal taxpayer, which is *Frothingham* v. *Mellon,* 262 U. S. 447, which was held to be too remote, uncertain and insignificant to entitle him to injunctive relief against an invalid federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act of the Administrator was invalid, but that they are in danger of sustaining a direct and substantial injury therefrom.

3. REMAND ORDER OF CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

United States Circuit Court of Appeals for the Fourth Circuit

No. 3971

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW, AND E. L. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS,

versus

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, APPELLEES

Order

The above-entitled cause coming on to be heard on the motion of Harold L. Ickes, Federal Emergency Administrator of Public Works, one of the appellants, that the said cause be remanded to the District Court for the Western District of South Carolina to the end that that court may reconsider its decision in the light of the contract entered into between the United States and the County of Greenwood, South Carolina, dated November 30, 1935:

It is ordered that said cause be remanded to the said District Court to the end that that court may reconsider its decision in the light of the said con-

tract and may take such further action as may be appropriate in the premises.

The court below is requested to hear the cause thus remanded with all convenient dispatch and to certify his findings of fact and conclusions of law to this court as soon as possible, to the end that the cause may be heard by this court upon appeal on the first Monday in January 1936, in accordance with the agreement of counsel this day made in open court to the effect that they would press for a speedy hearing of the cause and docket the appeal from the decision of the court below for hearing on the date aforesaid without reference to the rules regulating appeals, filing and printing briefs, etc. Let mandate issue forthwith.

This, the 5th day of December 1935.

(S.) JOHN J. PARKER,
Senior Circuit Judge.

A true copy.

Teste:

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

4. REMAND ORDER OF CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN THE ALABAMA POWER CASE

United States Court of Appeals for the District of Columbia

No. 6583

ALABAMA POWER COMPANY, APPELLANT

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS, ET AL., APPELLEES

Upon consideration of the motion of appellees that the above entitled cause be remanded to the Supreme Court of the District of Columbia in order that the pleadings may be reformed, it is, this 19th day of December, 1935, *Ordered* that the cause be remanded to the Supreme Court of the District of Columbia with directions to set aside forthwith the final decree entered by that court dismissing the bill, but with leave to the defendants (appellees here) to file any further pleadings or to supplement and amend their present pleadings within ten days, and likewise with leave to the plaintiff (appellant herein) to amend or supplement its bill of complaint within ten days thereafter; and that the parties shall then apply to the Supreme Court of the District of Columbia for an immediate trial on the merits.

Further ordered, by agreement and stipulation of the parties, that the injunction entered by the Supreme Court of the District of Columbia in this cause, and now in effect, shall continue in effect until the further order of this court.

Attest:

GEORGE E. MARTIN,
Chief Justice.

A true Copy.

Test:

HENRY W. HODGES,
Clerk of the United States Court of Appeals for the District of Columbia.

5. OPINION OF CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals for the District of Columbia

No. 6580

ALABAMA POWER COMPANY, APPELLANT

v.

HAROLD L. ICKES, ADMINISTRATOR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS; ET AL., APPELLEES

PER CURIAM: Appellees move this court to remand this cause to the Supreme Court of the District of Columbia with leave to the parties to amend their pleadings. The ground of the motion is that after the decree was entered in this cause in the Supreme Court of the District, and while the cause was pending on appeal, the Administrator of Public Works on December 2, 1935, entered into an agreement with the City of Sheffield, Alabama, and with other Alabama municipalities, with whom similar agreements had been made, terminating the former agreement relating to the subject matter of the suit; that subsequently on December 4, 1935, the Administrator entered into a new agreement with the City of Sheffield and with other Alabama municipalities, copies of which are filed with the motion.

We set the motion for hearing and have heard argument of counsel for and against the granting of the motion. We think we have the power to grant the motion if it should appear to be proper to do so. After consideration, we have concluded to grant the motion on the terms made part of our order.

The exhibits filed with the motion unmistakably show that the agreement between the Administrator of Public Works and the municipalities involved is essentially different from the agreement which the bill of complaint prayed should be enjoined. To ignore the situation thus brought about and to proceed to hear the cause on the present record would, as we think, be to do a futile act. The agreement which the bill of complaint sought to restrain the performance of, admittedly is not the agreement now in effect, and the conclusion of this court as to the validity or invalidity of that agreement would not be decisive of the validity or invalidity of the agreement which has now been made and substituted in its place. Nor would it settle the controversy.

The lower court issued a preliminary injunction on the filing of the bill and, nothwithstanding it subsequently sustained a motion to dismiss the bill, retained the injunction in full force and effect. As our order on this motion will further continue the injunction order until the case is again brought here on appeal and is decided by us, or otherwise

finally disposed of to the satisfaction of all parties, appellant will be fully protected; and the court below and this court, by the granting of the motion, will have the opportunity and the duty of deciding an existing, rather than a moot, controversy.

A true Copy.

Test:

HENRY W. HODGES,
Clerk, of the United States Court of Appeals for the District of Columbia.

54605—36——5

6. OLD CONTRACT BETWEEN P. W. A. AND GREENWOOD COUNTY

LOAN AND GRANT AGREEMENT
BETWEEN THE
COUNTY OF GREENWOOD,
SOUTH CAROLINA,
AND THE
UNITED STATES OF AMERICA

P. W. A. Docket No. 3972

Part 1

1. *Purpose of Agreement.*—Subject to the terms and conditions of this Agreement, the United States of America (herein called the "Government") will, by loan and grant not exceeding in the aggregate the sum of $2,852,000 (herein called the "Allotment"), aid the County of Greenwood, South Carolina (herein called the "Borrower"), in financing a project (herein called the "Project"), consisting substantially of constructing a hydro-electric plant comprising an earthen dam across the Saluda River, a 15,000 K. W. Generating Station with necessary control equipment, transmission lines, and rural distribution all pursuant to the Borrower's application (herein called the "Application"), P. W. A. Docket No. 3972, Title II of the National Industrial Recovery Act (herein called the "Act")

and the Constitution and Statutes of the State of South Carolina (herein called the "State").

2. *Amount and Method of Making Loan.*—The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $2,284,000 aggregate principal amount of negotiable coupon bonds (herein called the "Bonds") of the description outlined below or such other description as may be satisfactory to the Borrower and to the Administrator, bearing interest at the rate of 4 percent per annum, payable semi-annually from date until maturity, less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) *Date.*—October 1, 1934.

(b) *Denomination.*—$1,000.

(c) *Place of Payment.*—At the office of the Treasurer of the Borrower in the City of Greenwood, South Carolina or, at the option of the holder, at the office of the fiscal agent of the Borrower in the Borough of Manhattan, City and State of New York.

(d) *Registration Privileges.*—Registerable at the option of the holder as to principal only.

(e) *Maturities.*—Payable, without option of prior redemption, on the first day of October in years and amounts as follows:

Year:	Amount	Year:	Amount
1936	$50,000	1949	$95,000
1937	55,000	1950	95,000
1938	60,000	1951	100,000
1939	65,000	1952	105,000
1940	70,000	1953	110,000
1941	70,000	1954	115,000
1942	75,000	1955	115,000
1943	75,000	1956	115,000
1944	75,000	1957	120,000
1945	80,000	1958	125,000
1946	85,000	1959	125,000
1947	90,000	1960	124,000
1948	90,000		

(f) *Security.*—Special obligations of the Borrower, payable solely from and secured by the pledge of, and first lien on a fixed amount of the gross revenues derived from the operation of the entire hydro-electric power generating transmission and distribution system, which fixed amount shall be sufficient at all times to pay the principal of and interest on the Bonds as and when the same become due and payable, and additionally secured by a statutory lien upon the system and any extensions or appurtenances thereto.

3. *Amount and Method of Making Grant.*—The Government will make and the Borrower will accept, whether or not any or all of the Bonds are sold to purchasers other than the Government, a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The determination by the Federal Emergency Administrator of Public Works (herein called the "Administrator") of the cost of the labor and materials

employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds or interest coupons or both. If all of the bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money. In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $682,000.

4. *Bond Proceedings.*—When the Agreement has been executed, the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. *Bond and Grant Requisitions.*—From time to time after the execution of this Agreement the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "Requisition").

6. *Bond Purchases.*—If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Administrator, the Government, within a reasonable time

after the receipt of such Requisition, will take up and pay for Bonds, having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project.

7. *Grant by Payment of Money.*—If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and (*a*) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been com-

pleted, or (*b*) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined; provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

8. *Grant by Cancellation of Bonds.*—If the Borrower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment

of such difference shall have been otherwise provided for by the Government.

9. *Grant Advances.*—At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

10. *Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts.*—The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8, Part 1, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7, Part 1, hereof, promptly upon the receipt of such proceeds or payments in a separate account or accounts (each of such separate accounts herein called a "Construction Account"), in a bank or banks

which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

10 (a). *Funds from Sale of Timber.*—Funds received from sale of timber cleared from submerged land shall be paid into the Bond Fund or into the Construction Account at the election of the Administrator.

11. *Disbursement of Monies in Construction Accounts and in Bond Fund.*—The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and as shall have been approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof. The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

12. *Other Financial Aid from the Government.*—If the Borrower shall receive any funds (other

than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amounts of Bonds to be purchased by the Government shall be reduced.

13. *Construction of Project.*—Not later than upon the receipt by it of the first Bond payment, the Borrower will commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications and construction contracts which shall be satisfactory to the Administrator, and under such engineering supervision and inspection as the Administrator may require. Except with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement; provided, that nothing contained in this section shall be construed as imposing a liability of any character upon the general credit and taxing power of Greenwood County.

13. (a). *Transmission Line.*—All transmission lines, wish-bone cross-arms, used by the applicant shall be of welded galvanized steel and not of creosoted timber and, in the event that telephone cables be added to 44 K. B. lines, instantaneous, not inverse, time limit relays shall be used on generator panels.

14. *Information.*—During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower as the Administrator or any such purchaser may at any time reasonably require.

15. *Representations and Warranties.*—The Borrower represents and warrants as follows:

(a) *Financial Condition.*—The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of such assets or in such financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(b) *Fees and Commissions.*—It has not and does

not intend to pay any bonus, fee or commission in order to secure the loan or grant hereunder;

(c) *Affirmation.*—Every statement contained in this Agreement, in the Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

16. *Bond Circular.*—The Borrower will furnish all such information in proper form for the preparation of a Bond Circular and will take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per centum of the Bonds may reasonably request to aid in the sale by the Government of such purchaser or purchasers of any or all of the Bonds.

17. *Expenses.*—The Government shall be under no obligation to pay any costs, charges, or expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing, and delivering the Bonds, and any legal, engineering, and accounting costs, charges, or expenses incurred by the Borrower.

18. *Waiver.*—Any provision of this Agreement may be waived or amended with the consent of the

Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

19. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

20. *Validation.*—The Borrower hereby covenants that it will institute, prosecute, and carry to completion in so far as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate, or advisable to empower the Borrower to issue the Bonds and to remedy any defects, illegalities, and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate, or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder, a letter from the Governor of the State stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities, or

irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

21. *Naming of Project.*—The Project shall never be named except with the written consent of the Administrator.

22. *Undue Delay by the Borrower.*—If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

23. *Conditions Precedent to the Government's Obligations.*—The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) *Financial Condition and Budget.*—If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof;

(b) *Cost of Project.*—If the Administrator shall not be satisfied that the Borrower will be able to

complete the Project for the sum of $2,852,000, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) *Compliance.*—If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) *Legal Matters.*—If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor, or the construction of the Project;

(e) *Representations.*—If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) *Maturity of Bonds Sold to Government.*—If, in the event that some of the Bonds are sold to purchasers other than the Government, the maturities of the remaining Bonds are not satisfactory to the Administrator;

(g) *Litigation.*—If the Administrator shall not be satisfied that all pending litigation or litigations hereafter instituted has been so adjudicated that

the validity of the bonds, the security offered, the construction and operation of the project have not been adversely affected.

(h) *Licenses.*—If the Administrator shall not be satisified that the Borrower has obtained the necessary permit and/or license from the Federal Power Commission and such other permits and licenses as may be necessary to construct and operate the project.

(i) *Rate Resolution and Bond Resolution.*—If the Borrower shall not have adopted a resolution satisfactory in form and substance to the Administrator, providing for rates to be charged for services afforded by the hydro-electric system, and shall not have adopted a resolution, satisfactory in form and substance to the Administrator, authorizing the issuance of the Bonds.

(j) *Specifications and Contracts.*—If the specifications of materials to be used in the Construction of the Project and the bids and/or contracts entered into between the Borrower and contractors shall not be satisfactory in form and substance to the Administrator.

(k) *Contract for sale of electric current.*—If the Borrower shall not have obtained legal contracts with municipalities, corporations, or other consumers for the sale of current and power, which contracts shall be satisfactory to the Administrator as to form, substance, and aggregate amount of current to be sold under such contracts, which con-

tracts shall be for a period of at least five years providing for the sale of at least twenty-five million kw.-hrs. per year of firm power at an average annual rate of not less than 7.6 mills per kw.-hr. and for the sale of approximately 5,000,000 kw.-hrs. per year of secondary power at approximately 5 mills per kw.-hr., or the Borrower shall obtain contracts, or submit evidence, satisfactory to the Administrator that the Borrower will sell a sufficient amount of kw.-hours as will in the opinion of the Administrator produce the equivalent total revenues.

24. *Special Covenant—Rural Telephone Distribution Lines.*—In the event that the applicant shall permit the use of the radial rural distribution line for a telephone system, a rate of not less than $1.00 per subscriber per year shall be charged for this service.

Part 2

In consideration of the grant, the borrower covenants that:

1. *Construction Work.*—All work on the Project shall be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. The following rules and regulations as set out in Bulletin No. 2, Non-Federal Projects revised March 3, 1934, entitled "P. W. A. Requirements as to Bids, Contractors' Bonds, and Contract, Wage, and Labor Provisions and General Instructions as to Applications and Loans and

GRANTS", with all blank spaces filled in as provided in said Bulletin, shall be incorporated verbatim in *all construction contracts* for work on the Project. (Particular care should be taken that in all such construction contracts *the following words* are inserted in the blank space in Paragraph 3 (a) (1): "County of Greenwood and/or the County of Newberry, and/or the County of Laurens" and *the following words* are inserted in the blank space in Paragraph 3 (a) (2): "State of South Carolina").

1. (a) *Convict labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project.

(b) *Thirty-hour week.*—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government engineer, no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week: *Provided,* That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

2. *Wages.*—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensa-

tion sufficient to provide for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor_____
Unskilled labor_____

(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: *Provided,* That such agreed wage rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

(c) The above designated minimum rates are not to be used in discriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers."

(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the act permitting longer hours or lower minimum wage rates.

(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: *Provided, however,* That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of South Carolina to be paid by employees, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of South Carolina, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the engineer inspector

shall be furnished with a sworn statement thereof on demand.

(g) The Board of Labor Review (herein called the "Board") shall hear all labor issue arising under the operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in paragraph 2 (a), (b), and (c) hereof) all contracts for work on the project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any subcontract shall be increased by an amount equal to any such increased cost, or decreased in an amount equal to such decreased cost.

(i) Engineers, architects, and other professional and subprofessional employees engaged in duties normally done at the site of the project shall receive at least the prevailing rates for the various types of service to be rendered, provided that in no case shall professional employees receive less than the following weekly compensation for 40 hours

or less irrespective of the number of hours employed: $36.00 in the northern zone; $33.00 in the central zone; and $30.00 in the southern zone. Where the working week is longer than 40 hours, weekly compensation shall be increased proportionally. Compensation under this paragraph shall be subject to the approval of the Government Engineer.

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivision and/or county) _____ and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or district) _____: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(b) *Employment services.*—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: *Provided, however,* That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but,

if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of this paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

(c) *Compliance with Title I of the Act.*— The following sections 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employees and no

one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing."

4. *Human labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Compensation insurance.*—Every employer of labor shall provide, if permitted by the laws of South Carolina, adequate workmen's compensation insurance for all labor employed by him on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premiums, derive a similar protection.

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a

laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.* — Under all construction contracts, Greenwood County (The borrower) may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

8. *Accident prevention.*—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

9. *N. R. A. Compliance.*—The contractor shall comply with each approved code of fair competition to which he is subject, and

if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement), and Greenwood County (The borrower) shall have the right, subject to the approval of the Government engineer, to cancel this contract for failure to comply with this provision and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor. So far as articles, materials or supplies produced in the United States are concerned, no articles, materials or supplies shall be accepted or purchased for the performance of the work nor shall any subcontracts be entered into for any articles, materials or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

10. (a) *Inspection of records.*—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of mate-

rials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

(b) There shall be provided for the use of the engineer inspector such reasonable facilities as he may request. In case of dispute the Government engineer shall determine the reasonableness of the request.

11. *Reports.*—Every employer of labor on the project shall report within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also furnish to Greenwood County

(the borrower) to the Government engineer and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government engineer, such services shall be paid for in full at least once a month and such materials, tools, implements, and appliances shall be paid for at least once a month to the extent of 90 percent of the cost thereof to the contractor, and the remaining 10 percent shall be paid 30 days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

13. *Signs.*—Signs bearing the legend Public Works Project No. 3972 shall be erected in appropriate places at the site of the project.

14. All reasonable rules and regulations which the Public Works Administration may prescribe toward the effectuation of the matters covered by paragraphs 1 to 13, inclusive, shall be observed in the performance of the work.

15. *Subcontractors.*—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract

affecting such subcontractors, particularly paragraphs 1 to 14, inclusive.

(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised (March 1934).

16. *Termination for breach.*—In the event that any of the provisions of paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any subcontract on the work, Greenwood County (The borrower) may, subject to the approval of the Government engineer, and upon request of the Administrator, shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within 10 days after the serving of such notice such violation shall cease, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination Greenwood County (the borrower) may take over the work and prosecute the same to completion or otherwise for the account and at the expense of the contractor and/or such subcontractor, and the contractor and his sureties shall be liable to Greenwood County (the borrower) for any excess cost occasioned Greenwood County (the borrower) in the event of any such termination, and Greenwood County (the borrower) may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work, and necessary

therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

17. *Definitions.*—The term "Act" as used herein refers to the National Industrial Recovery Act. The term "Government engineer" as used herein shall mean the State engineer (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "engineer inspector" as used herein refers to State engineer inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performances of the work.

2. *Restriction as to Contractors.*—The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor, who has not signed U. S. Government Form No. P. W. A. 61, revised March 1934.

3. *Bonds and Insurance.*—Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide

public liability insurance in an amount satisfactory to the Administrator.

4. *Force Account.*—All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force account basis.

This agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This agreement shall be governed by and be construed in accordance with the laws of the State. If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto, provided, however, that in the opinion of the Administrator, the Agreement does not then violate the terms of the Act; provided, however, that this Agreement shall not be construed so as to create a debt of Greenwood County or so as to in any manner impose a liability upon the general credit of said County or its taxing powers, it being the intention of this Agreement to provide that the payment of the

principal of and interest on the bonds and the maintenance and operation of the hydro-electric system shall be paid solely and exclusively from the revenues derived from the operation of the said system herein described, and that the costs of constructing and completing said system shall be paid exclusively from the proceeds of the bonds and the Grant herein described.

IN WITNESS WHEREOF, the Borrower and the Government have respectively caused this Agreement, to be duly executed as of December 8, 1934.

By County of Greenwood, South Carolina:

Signed and Approved:

E. L. BROOKS,
County Supervisor.

[SEAL] (Signed) S. A. AGNEW,
County Treasurer.

E. L. BROOKS,
County Supervisor.

Attest:

E. I. DAVIS,
Secretary, Finance Board for Greenwood County.

UNITED STATES OF AMERICA,
By HAROLD L. ICKES,
Federal Emergency Administrator of Public Works.

7. NEW CONTRACT BETWEEN P. W. A. AND GREENWOOD COUNTY

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS,
Washington, D. C.

Superseding Loan and Grant Agreement Between the County of Greenwood, South Carolina, and the United States of America (P. W. A. Docket No. 3972)

WHEREAS the United States of America and the County of Greenwood, South Carolina, entered into a loan and grant agreement dated as of December 8, 1934, and

WHEREAS it is deemed to the mutual advantage of said parties to terminate said loan and grant agreement and to substitute in place thereof a new agreement,

Now, therefore, it is hereby agreed by and between said parties, that said Loan and Grant Agreement dated as of December 8, 1934, be and the same hereby is terminated and the following agreement by and between said parties substituted in lieu thereof:

1. *Loan and Grant.*—The United States of America (herein called the "Government") will aid in financing the construction of a hydroelectric

plant comprising an earthen dam across the Saluda River, a 15,000-Kw. Generating Station with necessary control equipment, transmission lines, and rural distribution (herein called the "Project"), by making a loan and grant to the County of Greenwood, South Carolina (herein called the "Applicant"), in an amount not exceeding in the aggregate the sum of $2,852,000.

2. *Method of Making Loan.*—The Government will purchase from the Applicant, at the principal amount thereof plus accrued interest, obligations (hereinafter called the "Bonds") of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $2,219,000, less such amount of such Bonds, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: The County of Greenwood.

(b) Type: Negotiable, special obligation, revenue serial coupon bond.

(c) Denomination: $1,000.

(d) Date: October 1, 1934.

(e) Interest rate and interest payment dates: Four per centum per annum, payable semiannually on April 1 and October 1.

(f) Place of payment: At the office of the Treasurer of the Applicant in the City of Greenwood, South Carolina, or, at the option of the holder, at the office of the fiscal agent of the Applicant in the Borough of Manhattan, City and State of New York.

(g) Registration privileges: As to principal only at the option of the holder.

(h) Maturities: October 1 in years and amounts as follows:

1936	$48,000	1949	$92,000
1937	53,000	1950	92,000
1938	58,000	1951	97,000
1939	63,000	1952	102,000
1940	68,000	1953	107,000
1941	68,000	1954	112,000
1942	73,000	1955	112,000
1943	73,000	1956	112,000
1944	73,000	1957	117,000
1945	78,000	1958	122,000
1946	82,000	1959	122,000
1947	87,000	1960	121,000
1948	87,000		

(i) Payable as to both principal and interest from and secured by a pledge of, and first lien on a fixed amount of the gross revenues derived from the operation of the entire hydroelectric power generating, transmission, and distribution system, which fixed amount shall be sufficient at all times to pay the principal of and interest on the Bonds as and when the same become due and payable, and additionally secured by a statutory lien upon the system and any extensions or appurtenances thereto.

3. *Amount of Grant.*—The Government will make the grant in an amount equal to thirty per-cent (30%) of the cost of labor and materials employed upon the Project, but not to exceed, in any event, the sum of $682,000.

4. *Conditions Precedent.*—The Government will be under no obligation to take up and pay for any

Bonds which it herein agrees to purchase or to make any grant:

(a) *Financial Condition.*—If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government.

(b) *Cost of Project.*—If it appears that the Applicant will not be able to complete the Project for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, will be necessary to complete the Project.

(c) *Plans and Specifications and Certificate of Purposes.*—If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.*—The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of its application for a loan and grant.

7. *Information.*—The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the Bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.*—The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the Bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the Bonds.

9. *Insurance.*—The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.*—The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Payment for Bonds.*—A requisition requesting the Government to take up and pay for Bonds

will be honored as soon as possible after such Bonds are ready for delivery, if the bond transcript and other documents necessary to support such requisition are complete.

(b) *Grant Payments.*—Simultaneously with the delivery of and payment for the Bonds by the Government, or, where Bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant shall so requisition and if such requisition is accompanied by a signed certificate of purposes in which appear in reasonable detail the purposes for which the funds will be used and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount equal to 15 percent of the previously estimated cost of labor and materials employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which together with the previous grant payment is equal to 30 percent of the cost of labor and materials employed upon the Project. The grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this Agreement.

(c) *Final Grant Payment.*—At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant

which, together with all previous payments on account of such grant, shall be an amount equal to 30 percent of the cost of labor and materials employed upon the Project, but not to exceed, in any event, the sum of $682,000. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this Agreement. The final grant payment may be made either wholly by the payment of money, or partially by payment of money and partially by cancellation of Bonds or, interest coupons or both, or wholly by such cancellation.

(d) *Construction Account.*—A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant payments, the proceeds from the sale of the Bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project, shall be deposited in the Construction Account, promptly upon receipt thereof. All accrued interest paid by the Government at the time of delivery of the Bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(e) *Disbursement of Moneys in Construction Account.*—Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase Bonds, if any such Bonds are then held by the Government, or be transferred to the Bond Fund.

(f) *Use of Moneys in Bond Fund.*—Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of the Bonds.

11A. *Construction of Project.*—The following principles have been adopted by the Federal Emergency Administration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth is conditioned upon the adoption of said principles by the Applicant, in the exercise of its lawful discretion, and upon its applying the same in the construction of the Project.

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open, and competitive bidding for contracts for

construction and contracts for the purchase of materials and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open, and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder for the supplying of materials and equipment.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk, and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the project, except where it is required by the law of South Carolina that protection for labor and materialmen be provided by a bond separate from the performance

bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate. However, where the contract price exceeds $1,000,000, and the obtaining of a bond written in such amount is difficult, a bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each subcontractor.

(f) That minimum or other wage rates required to be predetermined by the law of South Carolina or local ordinance shall be predetermined in accordance therewith by the public body constructing the project, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, such public body shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h) That the project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof may, if the public body constructing the project so desires, be inserted verbatim in such construction contracts or contract.)

12. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the Project, excepting only such rights as they may have as a holder of such Bonds under the laws and the Constitution of South Carolina and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such Bonds.

13. This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project.

14. This entire contract is subject to the terms of the injunction decree entered by the District Court of the United States for the Western District of South Carolina.

In Witness Whereof, the Applicant and the Government have respectively caused this Agreement to be duly executed as of November 30th, 1935.

Signed and Approved.

By County of Greenwood, South Carolina:

E. L. Brooks,
County Supervisor.

[seal] (Signed) S. A. Agnew,
County Treasurer.

E. L. Brooks,
County Supervisor.

Attest:

E. I. Davis,
Secretary of Finance Board for Greenwood County.

United States of America,
Federal Emergency Administrator of Public Works,
By Horatio B. Hackett,
Assistant Administrator.

Exhibit A

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative, and supervisory positions no individual directly employed on the project shall be per-

mitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week: PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rates set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
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(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay

roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of _____ to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of _____, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.' "

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order:

(1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) _____ and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) _____ PROVIDED, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and

labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide, _____ for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public

Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

> Public Liability Insurance in an amount not less than $_____ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $_____, on account of one accident, and Property Damage Insurance in an amount not less than $_____.

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

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6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings, and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, materialmen, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.*—The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names

and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment neces-

sary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs.*—The contractor shall furnish signs bearing the legend: "FEDERAL PUBLIC WORKS PROJECT No. ------", as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4, inclusive, 6, 8 to 13, inclusive, 17, the Regulations Issued Pur-

suant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor

and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in locali-

ties where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1 (b):

And provided further, It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1 (b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor

employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations Issued Pursuant to So-Called "Kick-Back Statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

SECTION 1. Said Act reads as follows:

> To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.
>
> *Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled. That whoever shall* induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

SEC. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

SECTION 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of_____,

*County of*_____, *ss:*

I, _____ (name the party signing affidavit),_____ (Title), do hereby certify that I am (the employee of)_____(name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of_____ (project) for the weekly pay roll period from the _____ day of _____ 193_____, to the _____

day of ------, 193------, that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ------ day of ---------- 1932.

SECTION 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

SECTION 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

SECTION 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

SECTION 6. These regulations shall become effective on January 15, 1935.

The clause in the pay roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and

paid to each person employed by the said contractor * * *'' is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause ''* * * that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made'' does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The ''Regulations Issued Pursuant to So-Called 'Kick-Back' Statute'' shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment supplies engaged in installation of the equipment at the site of the project.

Penalty

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

U. S. GOVERNMENT PRINTING OFFICE: 1936

No. 8335

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION; J. K. COE, MAYOR; A. GRANTHAM, TREASURER; WILLIAM T. REED, CLERK; ALFRED SWANSON, JOHN FREDERICK, FRANK H. LAFRENZ, JOSEPH LOIZEL, O. M. HUSTED, RICHARD WEEKS, S. H. MCEUEN, AND J. H. POINTNER, MEMBERS OF THE CITY COUNCIL OF SAID CITY OF COEUR D'ALENE, IDAHO; AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

MOTION OF APPELLANT, HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, TO REMAND CASE TO THE DISTRICT COURT AND MEMORANDUM IN SUPPORT THEREOF

JAMES W. MORRIS,
Assistant Attorney General.

ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.

JOHN W. SCOTT,
Special Assistant to the Attorney General.

JEROME N. FRANK,
Counsel for the Federal Emergency Administrator of Public Works.

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Errata

ge 8. Third paragraph, last line: "(83 et seq.)" should read "(85 et seq.)".

12. End of first paragraph, last line: "83 et seq." should read "85 et seq."

13. Fourth line from bottom of first paragraph: the "(d)" should read "(c)".

13. Paragraph 3, third line from top: after the words "Appendix hereto" add in parentheses "(pages 1 to 10)".

16. Tenth line from bottom of page: the word "erros" should read "errors".

19. Seventeenth line from top of page: the sentence "A statute valid as to one set of facts may be invalid as to another." Should be in italics.

23. Next to last line from bottom of page: the word "in" should be inserted between the words "If" and "the".

26. Sixth line from top of page: the word "character," should be inserted after the word "concrete".

26. Seventh line from top of page: the word "constitution" should read "constituting".

28. Second paragraph, second line: "(pages 61 to 63)" should read "(pages 11 to 48)".

51. Twelfth line from bottom of page: the word "Court" should

In the United States Circuit Court of Appeals for the Ninth Circuit

No. ——

CITY OF COEUR D'ALENE, IDAHO, A MUNICIPAL CORPORATION, ET AL. APPELLANTS

v.

THE WASHINGTON WATER POWER COMPANY, A CORPORATION, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

MOTION TO REMAND

Now Comes the appellant, Harold L. Ickes, Administrator of the Federal Emergency Administration of Public Works, and respectfully shows to this Court:

I

The final decree (R. 262) entered herein by the District Court of the United States for the District of Idaho, Northern Division, on September 9, 1935, from which the present appeal was taken, enjoins this appellant from lending, giving or granting to the City of Coeur d'Alene, Idaho, any moneys of the United States to be used in the construction of a municipal electric light plant for the generation and distribution of electricity for said city and from

entering into any contract with the city to purchase any of its bonds or to make any loan, gift or grant of moneys to said city for the purpose of constructing or assisting in the construction of a municipal electric power generating and distribution system. Likewise the city and the other appellants, its officers, are also enjoined from proceeding with the issuing, pledging, selling, or delivering any bonds of said city to this appellant. The bill filed by appellee and said decree related to a contract between said city and this appellant (R. 104), executed by the City on November 23, 1934, but never executed by this appellant. One of the fundamental bases of the decree was the alleged attempt of this appellant to control and regulate, by means of said contract, the rates of the City and of appellee, which the District Court held to be in violation of the 10th Amendment.

II

During the pendency of this appeal, this appellant and said City conducted negotiations (more fully set forth in the memorandum in support of this motion hereto attached and by this reference thereto made a part hereof) which culminated in an understanding between this appellant and the city that, if and when said decree is appropriately modified, a new contract (a copy of which is hereto attached marked "Exhibit 1" and by reference thereto made a part hereof) will be executed. The reasons for the intention and desire to abandon the old proposed contract and execute the new contract are more fully set forth in said attached

memorandum and in a letter attached hereto (marked "Exhibit 2" and by this reference thereto made a part hereof).

III

As appears from the attached memorandum the new contract differs in significant respects from the old contract. It eliminates substantially all the provisions held invalid by the District Court, and particularly, all those provisions relating to or making possible any control or regulation of rates by the United States.

IV

This appellant submits that since this case has become moot in certain important respects it should, on the basis of authorities cited in the attached memorandum, be remanded to the District Court with directions to that Court to modify its decree to permit the parties to enter into a new contract in the form of Exhibit 1, with leave to appellants to file amended answers setting forth that fact, so that, upon the filing of such answers, and of such amended pleadings as appellee may thereafter file, prompt trial may be had of the issues raised by such pleadings.

V

This appellant desires and intends upon such a trial to introduce evidence proving that he intends never to execute the old proposed contract and that, in determining to execute the new contract, if permitted so to do, he considered solely whether the proposed loan and grant and said new contract complied in all respects with the provisions of Title II of

the National Industrial Recovery Act and the pertinent Executive Orders of the President of the United States, and more particularly gave no consideration to the following:

(1) The rates which might be charged by the city.

(2) The rates of the appellee.

(3) Whether lower rates for power are desirable.

(4) Whether it is desirable that the city should own and operate its own plant.

VI

This appellant offers to stipulate, as a condition of the granting of this motion, to expedite all proceedings in this cause and that the injunction decree shall, except for the execution of said new contract, remain in effect pendente lite.

Wherefore, upon the basis of the facts set forth and referred to in this motion and in the attached memorandum and the authorities referred to therein, this appellant respectfully prays that this cause be remanded to the District Court with directions as herein above set forth.

JAMES W. MORRIS,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
JOHN W. SCOTT,
Special Assistant to the Attorney General.
JEROME N. FRANK,
Counsel for the Federal Emergency Administrator of Public Works.

TABLE OF CASES

MEMORANDUM IN SUPPORT OF MOTION TO REMAND

I. The District Court, relying in considerable part upon provisions in the contract executed by the city in November 1934, and letters and telegrams from the Federal Emergency Administration of Public Works (hereinafter for convenience called "P. W. A."), found that the United States was unlawfully seeking to control the rates to be charged by the city for the services and facilities to be afforded by its proposed water and electric system, and thereby to control and bring about a reduction of the rates of appellee, in violation of the Tenth Amendment, and also that, on the basis of such fact appellee had a standing to bring a suit asserting the unconstitutionality of Title II of the National Industrial Recovery Act, despite *Frothingham* v. *Mellon*, 262 U. S., 447.

As a result of decisions by several Federal courts, appellant, the Federal Emergency Administrator of Public Works (hereinafter for convenience referred to as the "Administrator"), came to the conclusion in recent months that it was desirable that the form of contract employed by P. W. A. in making contracts with municipalities for the financing of power projects should be revised in certain fundamental respects; such revision included the elimination of all provisions relating to the rates of such municipalities.

In particular, the proposed contract with the appellant, City of Coeur d'Alene (executed in November 1934, by the city but never executed on behalf of the United States), contained provisions, especially with respect to rates, which, upon reflection, seemed of doubtful validity. Indeed the Administrator has concluded that (particularly in view of the fact that the bonds of the city to be acquired by the United States are general obligation bonds and not revenue bonds) it was a mistake ever to have inserted in the proposed old contract any provisions whatsoever with respect to the rates to be charged by the city and that the sending of the letters and telegrams above referred to, was also an error.

Representatives of the Administrator and of the City for some time in recent months (while this case was on appeal) have corresponded and conferred because of the Administrator's desire that a new contract should be executed between the city and the United States from which there would be eliminated all the provisions relating to rates and also certain other important provisions.

The following appears from the letter written by Administrator to the City, Exhibit 2 (83 et seq.):

When the Administrator authorized the old proposed contract to be sent to the City and when certain letters and telegrams relied upon by the District Court were sent out, the Administrator did not have called to his attention by his subordinates, and therefore did not have in mind, the fact that the

City's bonds were general obligation bonds payable out of taxes. In a case where P. W. A. makes a loan to a city to be evidenced by revenue bonds, the sole security for the loan consists of the earnings of the project financed by the proceeds of such bonds. Under Title II of the National Industrial Recovery Act, the Administrator can make no loans which are not reasonably secured. Consequently, if the sole security consists of such revenues, the Administrator is obligated, in deciding whether the loan should be made, to consider the prospective earnings of the project and it therefore is necessary to take into account the prospective rates that will be charged by the city and also to some extent the prospective rates to be charged by the City's competitor, because competitive rates may affect the earning power of the project and therefore the security of the loan. But where the loan is to be evidenced by general obligation bonds of the city, P. W. A., in determining the security of the loan, needs to consider merely the financial condition of the city generally, and usually [1] has ignored the revenues of the project and therefore has ignored the rates of the city and its competitors. In the case of the proposed old contract with the city of Coeur d'Alene, as above noted, the Administrator's attention was not directed to the fact that the bonds were general obligation bonds and he therefore overlooked that fact. He is occupied with a multitude of duties daily and occasional errors are therefore

[1] Exceptional instances are referred to in the Administrator's letter.

unavoidable.[2] Because of the foregoing, an error was made in including in that proposed contract with the city of Coeur d'Alene any provisions with respect to the rates of the city; and, for like reasons, he approved, without adequate consideration, an attitude, expressed in the letters and telegrams above referred to, suggested by some of his subordinates with respect to the rates and services of appellee. He reached the conclusion several months ago that that attitude was entirely unjustified and has completely repudiated and abandoned it. He reached that conclusion when his attention was first again directed to the proposed old contract and those letters and telegrams by reading for the first time,

[2] Some idea of the multitude of the Administrator's duties in connection with PWA may be inferred from the following statement made by Judge Parker in his opinion in the case of Greenwood County et al., v. Duke Power Company et al., (not yet reported, but printed, pages 11 et seq. of the Appendix submitted herewith):

> "The national character of the program here involved is shown, however, by the fact that projects of various kinds have been commenced in 3,040 of the 3,070 counties of the country; and the magnitude of the undertaking clearly appears from the report of the Administrator to the Senate, of March 22, 1934. See Senate Document No. 167, 73rd Congress, 2nd Session."

In addition to his duties as Federal Emergency Administrator of Public Works, Appellant Harold L. Ickes has multifarious duties to perform as Secretary of the Interior of the United States, as Administrator for the Oil Administration, as Chairman of the National Resources Board and in his several other official capacities.

when the case was on appeal, the opinion of the District Court in this case.[3]

He then concluded that, unless a new contract could be made which could be justified without any regard to such considerations as the rates for service of the city or appellee, he would be obliged to rescind the allotment on which the old contract was based—in which case there would be no contract whatsoever.[4] Upon reconsidering the project on that basis—and considering *solely* whether (a) the project would be a proper part of a comprehensive program of Public Works, (b) the general obligation bonds of the city would be reasonably secure, and (c) whether the project would help adequately to increase employment, and (d) other factors required by Title II of the National Industrial Recovery Act and the applicable Executive Orders of the President—he approved the making of a new contract in the form of Exhibit 1.

Accordingly he has—and has so advised the city—no intention of ever executing the old contract or any contract containing those terms of that contract not also contained in the new. His position is as follows: He has advised the city that (a) he has waived irrev-

[3] In his letter (Exhibit 2) the Administrator states that he regrets that he did not read that opinion sooner, but explains that his multitude of duties makes it impossible for him to keep constantly and closely in touch with the very considerable number of cases in which, as Administrator, he is involved.

[4] The allotment is simply an authorization to make a loan and grant. As the old proposed contract was never executed on behalf of the United States, there has never been any contract between the United States and the city.

ocably all those provisions of the old contract not set forth in the new contract, and (b) has completely abandoned and regrets that he ever expressed (1) any intention to have any control of any kind of the rates of the city or (2) any interest in appellee's or the city's rates or service. (See Exhibit 2 page 83 et seq.)

2. Because of the sweeping character of the injunction order entered by the District Court the city is unwilling to enter into a new contract, subject to the injunction, and not to become effective unless and until the injunction decree is appropriately modified; the city fears that the execution of a contract, even if it contained such a qualification, might be said to be in violation of the decree.

The effect of abandoning the old proposed contract and executing the new contract (subject to the decree) would be the same as if the parties had agreed to eliminate from the old proposed contract certain important provisions which the trial court found objectionable, and for that reason the Administrator was of the opinion that a new contract (properly worded so as to be subject to the injunction decree and not to become effective until that decree was appropriately modified) would not be in violation of the decree. The city, however, took the position that it would agree to execute a new contract, only if and when the decree has been appropriately modified.

The consequence is that, subject only to the injunction decree being thus modified, appellants are now ready to execute the new contract.

Because of the city's attitude, the Administrator has concluded that the wisest course is to file his

motion asking this court to remand this case with directions to the District Court to vacate and modify its decree to allow (a) the parties to enter into a new contract in the form of Exhibit 1; (b) with leave to appellants thereafter to file amended answers setting forth that fact and also the fact that, in determining to execute the new contract and in executing it the Administrator considered solely whether the proposed loan and grant and said new contract complied in all respects with the provisions of Title II of the National Industrial Recovery Act and the pertinent executive orders of the President of the United States and more particularly gave no consideration to the following: (1) the rates which might be charged by the City (since the bonds are general obligation bonds of the city); (2) the rates of the plaintiff; (3) whether lower rates for power are desirable; (4) whether it is desirable that the city should own and operate its own plant; and (d) that upon the filing of such answer and of such amended pleadings as appellee might file, there be a prompt trial of the issues raised by such pleadings.

3. The important differences between the old contract and the new are set forth in detail in the Appendix hereto. Perhaps the most important of those differences is the following: The old proposed contract provided that the United States should be under no obligation to pay for any of the bonds or to make any grant:

> Unless and until *the Borrower shall adopt a rate and bond ordinance satisfactory to the*

Administrator in form, sufficiency, and substance. Such ordinance shall, among other things, provide that:

(1) No donations, taxes, depreciation charges, or any other items of expense, except normal operating expenses and maintenance, together with water, lighting, and power extensions, shall be charged against the revenues of the Project;

(2) All municipally used water and electrical energy shall be paid for at current selling rate schedules, except water used in fighting fire, and a reasonable rate shall be paid for hydrant rental, all such payments to be made, as the service accrues, from the general funds of the Borrower into the funds of the Borrower's water and electric departments.

The proposed new contract, on the other hand, expressly provides that "*The Administrator shall have no right or power of any kind with respect to the rates to be fixed or charged by the Project.*" In this connection it will be noted that the new contract also expressly provides: "This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. *There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project.*" [5]

[5] See the comments on like provisions in the Greenwood County case, a copy of which is printed in pages 11 et seq. of the Appendix filed herewith.

If the injunction order is appropriately modified, the new contract, which will at once be executed, will entirely remove from this case those bases for the decree of the lower court with respect to the alleged attempted regulation by the United States of the rates of the city and the rates of appellee. As that alleged attempted regulation vitally affects not only the alleged invalidity of the old contract with respect to state law, but also assertions that the old contract violates the Federal statute and the constitution of the United States and gives the appellee a right to an injunction, it is plain that the intention to execute the new contract constitutes a most important and material alteration of the facts which were before the District Court prior to the entry of its decree. Because of the changes which will be made in the contract (and in the light of the limited considerations affecting the determination of the Administrator to execute the new contract, if permitted so to do), it will become clear upon a new trial that the correspondence and other data in the record bearing upon an alleged regulation of rates will become irrelevant and immaterial if they ever were material.

4. This Court is an appellate court, and, therefore, the Administrator cannot ask it to consider the new contract, and the facts set forth in Exhibit "2" as to the Administrator's intention, as evidence supplementing the record on appeal in arriving at a final decision of this case, for, obviously, this Court cannot consider those altered facts as part of the evidence.

Title 28, Section 863 of the United States Code expressly provides that upon the appeal of any cause in equity "no new evidence shall be received in the Circuit Court of Appeals, except in admiralty and prize causes." See *Russell* v. *Southard*, 12 Howard 139, 158, 159; *Chisholm-Ryder Co.* v. *Buck*, 65 Fed. (2d) 735, 737[6] (C. C. A. Fourth). The appropriate procedure, we submit (as shown by the authorities

[6] In the case of *Greenwood County* v. *Duke Power Co., et al.*, (involving a motion to remand (similar to the present motion) in a case involving a P. W. A. contract) the following remarks (not reported) were made by the Court of Appeals for the Fourth Circuit (the very court which had previously decided *Chisholm-Ryder* v. *Buck*, *supra*) in the course of its ruling that the case should be remanded: "Parker, J.: Gentlemen, we have given this matter very careful consideration. You raise here one of the most important constitutional questions now before the courts of the country, and it is important, I think, that when this question goes to the Supreme Court, as it will go to the Supreme Court, that there be no controversy about what the record means; what it does not mean; what is proper to go before it, and what is not proper. There is another thing: One of the ablest District Judges in the United States has passed on this case in the court below. The appellate courts are entitled to have the benefit of his judgment on the record and on any change in the record—not only entitled to have his judgment; we want his judgment. And the Supreme Court will want the case passed on in its final form by both courts below. There is a third consideration: *We are a court of erros and appeals, and we have no right to pass upon the matter as a court of original jurisdiction.* Now a change has been made in this record. How material it is, how immaterial it is, probably will not appear on the argument. Certainly a change has been made. Counsel for the Government, Department of Justice, Commissioner of Public Works, say it is an important change. We feel that the record as it is affected by this change ought to be passed on by the District Court before we pass on it." [Italics supplied.]

hereinafter cited) is to remand the case to the trial court.

5. The facts of the case before the trial court no longer exist. A controversy still exists, but it is not the same controversy as existed when the decree was entered. If this court were to pass on the case as it then existed, it would be deciding an unreal non-existent controversy—a practice which the federal courts in particular have consistently refused to follow, especially when the constitutionality of a statute is involved.

In *Ashwander* v. *Tennessee Valley Authority* (decided February 18, 1936) the Supreme Court said:

> *The judicial power does not extend to the determination of abstract questions. Muskrat* v. *United States,* 219 U. S. 346, 361; *Liberty Warehouse Company* v. *Grannis,* 273 U. S. 70, 74; *Willing* v. *Chicago Auditorium,* 277 U. S. 274, 289; *Nashville, Chattanooga & St. Louis Rwy. Co.* v. *Wallace,* 288 U. S. 249, 262, 264. It was for this reason that the Court dismissed the bill of the State of New Jersey which sought to obtain a judicial declaration that in certain features the Federal Water Power Act exceeded the authority of the Congress and encroached upon that of the State. *New Jersey* v. *Sargent,* 269 U. S. 328. For the same reason, the State of New York, in her suit against the State of Illinois, failed in her effort to obtain a decision of abstract questions as to the possible effect of the diversion of water from Lake Michigan upon hypothetical

> water power developments in the indefinite future. *New York* v. *Illinois,* 274 U. S. 488. At the last term the Court held, in dismissing the bill of the United States against the State of West Virginia, that general allegations that the State challenged the claim of the United States that the rivers in question were navigable, and asserted a right superior to that of the United States to license their use for power production, raised an issue "too vague and ill-defined to admit of judicial determinations." *United States* v. *West Virginia,* 295 U. S. 463, 474. *Claims based merely upon 'assumed potential invasions' of rights are not enough to warrant judicial intervention. Arizona v. California* 283 U. S. 423, 462. [Italics supplied.]

In *Cincinnati* v. *Vester,* 281 U. S. 439, 448, the Court said:

> It is an established principle governing the exercise of the jurisdiction of this Court, that it *will not decide important constitutional questions unnecessarily* or hypothetically. *Liverpool, New York & Philadelphia Steamship Company* v. *Commissioners of Emigration,* 113 U. S. 33, 39; *Siler* v. *Louisville & Nashville Railroad Company,* 213 U. S. 175, 191, 193; *United States* v. *Delaware & Hudson Company,* 213 U. S. 366, 407. [Italics supplied.]

There is involved in the present case not only a question of the constitutionality of a statute, but also the closely related question of the right of the appellee to raise the question of the constitutionality of expenditures under a federal statute, in the light of *Frothingham* v. *Mellon,* 262 U. S. 447.

In *Nashville C. & St. L. R. Co.* v. *Walters*, 294 U. S. 405, 415, the Court said:

> It (the Tennessee Supreme Court) held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads one-half of the cost of eliminating existing or future grade crossings; and that the Court could not "any more" consider "whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions" than it "could consider changed mental attitudes to determine the constitutionality and enforceability of a statute." A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. *A statute valid when enacted may become invalid by change in the conditions to which it is applied.* (Citing, inter alia, *Kansas City S. R. Co.* v. *Anderson*, 233 U. S. 325; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282, 289; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 722; *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 547; *Perrin* v. *United States*, 232 U. S. 478, 487.)

It is doubtless for that reason that the Supreme Court has several times refused to pass upon the constitutionality of a statute in the absence of findings of facts based upon adequate evidence. In *Hammond* v. *Shappi Bus Line*, 275 U. S. 164, the

city had enacted an ordinance excluding an interstate bus line from its streets. On an appeal from an interlocutory decree denying a preliminary injunction against the city, the Supreme Court remanded the case for proceedings on final hearing and the taking of evidence which would result in findings of fact bearing upon the constitutionality of the ordinance. The Court said (page 170): "The general principles governing the right of motor vehicles to use the highways in interstate commerce (citing cases) have been settled by these recent decisions. But the facts here alleged may, if established, require the application of those principles to conditions differing materially from any heretofore passed upon by this court." The court then went on to point out a large number of questions of fact (including the question of whether the city streets were congested and the date of the establishment of the plaintiff's lines) which might have an important bearing on the constitutionality of the ordinance.

The court then said (pp. 171, 172):

> These questions have not, so far as appears, been considered by either of the lower courts. The *facts* essential to their determination have *not been found* by either court. *And the evidence in the record is not of such a character that findings could now be made with confidence.* * * * *Before any of the questions suggested, which are both novel and of far-reaching importance, are passed upon by this court, the facts essential to their decision should be definitely*

found by the lower courts upon adequate evidence.[7]

In *Borden's Farm Products Company* v. *Baldwin*, 293 U. S. 194, a bill, to enjoin the enforcement of a state statute on the ground of its alleged unconstitutionality, was dismissed on a motion equivalent to a demurrer. On appeal the Supreme Court declined to pass on the merits of the suit and reversed the decree and remanded the cause for the taking of testimony and the making of findings of fact bearing on constitutionality. The Chief Justice made the following observations on this point (pp. 211–213):

> "For the present purpose, it is sufficient to say that these arguments are addressed to particular trade conditions in the city of New York, which largely lie outside the range of judicial notice. * * * But, the case is not before us upon evidence, or upon determinations of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made. As we have said, we may read the complaint in the light of facts of which we may take judicial notice, but, if so read, it may be regarded as sufficient, the decision of this

[7] In *Hammond* v. *Farina Bus Line and Transportation Co.*, 275 U. S. 173, a similar suit, a like motion for a preliminary injunction was made, but, by agreement of the parties to the suit, *the cause was submitted to the District Court as upon final hearing* and the bill was dismissed. The Supreme Court refused to pass upon the question of the constitutionality of the statute and remanded the case for the taking of evidence upon final hearing.

appeal should not turn on other facts which are the proper subjects of evidence and of determinations of fact by the trial court * * *.

"But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of Governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the Court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support. * * *

The importance of adequate findings of fact in relation to controlling economic conditions was emphasized in *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543. Before deciding the question we found that it was "material to know the condition of Washington at different dates in the past" and that "obviously the facts should be accurately ascertained and carefully weighed." We said that this could be done more conveniently in the Supreme Court of the District than here, and for this reason the judgment below, dismissing the bill, was reversed, and the cause was remanded

for appropriate ascertainment of the facts (p. 549).

Another illustration is found in *Hammond* v. *Schappi Bus Line*, supra, involving the validity of a city ordinance regulating motor traffic in designated parts of the city's streets. The lower courts had not made findings upon crucial questions of fact * * *. We held that before the questions of constitutional law, both novel and of far-reaching importance, were passed upon by this Court, "the facts essential to their decision should be definitely found by the lower courts upon adequate evidence" (pp. 171, 172). Concluding that the case had not been appropriately prepared for final disposition, we remanded it for proceedings in the District Court, "*with liberty, among other things, to allow amendment of the pleadings.*" This procedure was in accordance with well-established precedents. * * *

As we do not approve the procedure adopted below, we do not pass upon the ultimate question of the constitutionality of the statute. The plaintiff should be permitted to proceed with the cause; the motion for preliminary injunction should be heard and decided, and the cause should proceed to final hearing upon pleadings and proofs; the facts should be found and conclusions of law stated as required by Equity Rule 70½. [Italics added.]

If the case at bar there were no findings of fact, then it would be improper, in the light of the decisions

of the Supreme Court and Equity Rule No. 70½[8], for this Court to pass upon the case. The District Court did make findings of fact. But, *as the facts have materially changed since the decree was entered by the District Court, the situation, for practical purposes, so far as the presently existing facts are concerned, is precisely the same as if no findings of fact had been made by the District Court. Findings as to facts no longer existing are the equivalent of no findings whatsoever as to existing facts. It cannot be said, therefore, that the "facts essential to the decision have been found upon adequate evidence."*

In the case at bar, questions of novel and far-reaching importance are before the Court, namely, whether the Federal Statute is constitutional, whether if it is constitutional, the statute has been violated, and whether (even if the statute is unconstitutional or has been violated) the appellee has a standing to sue despite *Frothingham* v. *Mellon*, 262 U. S. 447. The determination of all of these questions must turn on the facts. The statute may be constitutional on one set of facts, but not on another; the statute may appear to have been violated on one set of facts, and not on

[8] As to the necessity for findings under Equity Rule No. 70½, see *Public Service Commission* v. *Wisconsin Telephone Company*, 289 U. S. 67; *Southwestern Bell Telephone Co.* v. *City of San Antonio* (C. C. A. 5th Circuit), 75 F. (2d) 880, certiorari denied 295 U. S. 754; *Sparks* v. *Mellwood Dairy* (C. C. A. 6th Circuit), 74 F. (2d) 695; *Louisville & N. R. Co.* v. *United States* (D. C. Ill.), 10 F. Supp. 185; *Siano* v. *Helvering* (C. C. A. 3rd Circuit) 79 F. (2d) 444. Compare *Railroad Commission of Wisconsin* v. *Maxey*, 281 U. S. 82, and *Nashville C. & St. L. R. Co.* v. *Walters*, *294 U. S. 405*.

another; and appellee's right to sue may exist on one set of facts and not on another.

In *Lawrence* v. *St. Louis San Francisco Railway Co.*, 274 U. S. 588, 596, the Court, in holding that an injunction should not be issued without giving the grounds therefor, said that that was particularly true in the case of an injunction against the enforcement of a state law, "For then, the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown." So, in the present case, the respect due to the Congress and to the Executive demands that the need for nullifying the action of either should be persuasively shown, and the Congressional or Executive action should not be nullified unless there is a finding of presently existing facts justifying such nullification.[9]

The presently existing relevant facts affecting constitutionality and related questions are not now before this court and can only be brought before this court by the introduction of further evidence in the trial court, and by findings of fact with respect thereto.

As stated by the Chief Justice in the case of *Ashwander* v. *Tennessee Valley Authority*, *supra*,

> We agree with the Circuit Court of Appeals that the question to be determined is limited

[9] That rules applicable to cases involving the validity of state legislation are equally applicable to cases involving the validity of federal statutes, see *Heald* v. *District of Columbia*, 259 U. S. 114, 123.

> to the validity of the contract of January 4, 1934. *The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete constitution, an actual or threatened interference with the right of the persons complaining.* * * *

Similarly, Judge Sibley in his concurring opinion in the same case in the Circuit Court of Appeals (C. C. A. 5th) 78 Fed. (2d) 578, 583, stated:

> This case is not to be decided by the purposes and plans of the Board, but by the validity of what is about to be done under the attached contracts.

With the provisions of the old proposed contract as to rates completely eliminated, the Administrator is completely without means to affect the rates of the plaintiff even if he had the desire so to do. His intentions, motives, or desires, regardless of what they might be, could not hurt the plaintiff because he will be without the means of putting them into action. It is "action of a definite and concrete character" and not wishes or desires of which appellee may be heard to complain. With the means of injury eliminated, letters and telegrams indicating an alleged prior improper policy will no longer be material, if they ever were material.

6. It will appear from the Appendix to this memorandum that the proposed new contract also eliminates many other important provisions of the old

contract, relating to the construction of the project, of which appellee complains. The elimination of those provisions was due in considerable part to the opinion of the Court of Appeals for the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *Kennett*, 78 Fed. 911, in which that court held that a similar P. W. A. contract violated the laws of the State of Missouri. (See pages 1 et seq. of Appendix filed herewith explaining important differences between the old proposed contract and the new proposed contract; see also opinion of the Circuit Court of Appeals for the Fourth Circuit in the Greenwood County case, printed in the Appendix, pages 11 et seq.)

7. The Administrator believes that the facts set forth in his motion and this memorandum make this case moot as to some of the most important questions involved, and therefore justify a remand so as to permit the execution of the new contract and the introduction of evidence as to his changed intentions in authorizing its execution. He believes that, out of respect to this Court, he should call its attention to the changed circumstances and that it *would be unfair to the Judiciary, to the Congress and to the Executive Branch of the Government to have the constitutionality of the Federal Statute determined on the basis of administrative action (now no longer existent) due to inadvertent errors which have been rectified.*

8. In several suits substantially similar to the case at bar (brought in Federal courts by public-utility companies to enjoin municipalities and the Public Works Administration from carrying out contracts—

substantially similar to the old proposed contract in this case—for loans and grants for the construction of electric power plants) motions to remand to the trial court were made and granted which were based on substantially the same facts as the present motion. In each case, while on appeal, a contract between the municipality and this appellant, which was in existence when the lower court had entered its decree, was abrogated and a new contract (substantially similar to the new contract, Exhibit 1) was executed.

There is printed in the Appendix submitted herewith (pages 61 to 63) the opinion of the United States Circuit Court of Appeals for the Fourth Circuit in *Greenwood County, et al.* v. *Duke Power Co., et al.*, decided February 22, 1936. In that case there had been a trial with reference to a contract between the County of Greenwood and P. W. A., substantially similar to the old proposed contract between this appellant and P. W. A.

A decree had been entered by the trial court in favor of the plaintiff power companies, enjoining the county and P. W. A. from proceeding with the performance of the contract. While the case was on appeal from that decree, the county and P. W. A. entered into a new contract substantially similar to the new proposed contract between this appellant and P. W. A., excepting that said new contract is less onerous in the terms imposed upon the city of Coeur D'Alene than those imposed on the county by the new contract between the County of Greenwood and P. W. A., due to the fact that the P. W. A.

is to purchase *general obligation bonds* of the city, whereas under its contract with Greenwood County, P. W. A. agreed to purchase *revenue bonds* payable as to principal and interest solely out of the earnings of the county's plant. Because of the difference between that contract and the proposed new contract in the present case, the Administrator, in making the new contract with the County of Greenwood, had to consider the prospective earnings of the county's plant and therefore had to take into account its prospective rates. On a new trial in the present case we shall offer the Administrator's testimony to show that in authorizing the proposed new contract between the city and P. W. A. (since the bonds are general obligation bonds of the city) the Administrator has not taken into account the question of rates, and that the new contract with the city therefore expressly provides that, "*The Administrator shall have no right or power of any kind with respect to the rates to be fixed or charged by the project*", whereas the new contract with the County of Greenwood provided:

> The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the Project, excepting only such rights as they may have as a holder of such Bonds under the laws and the Constitution of South Carolina and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such Bonds.

Although a decree based upon a trial on evidence had been entered by the trial court in the Greenwood County case and the term at which that decree was entered had already expired when the new contract was executed, the Court of Appeals for the Fourth Circuit, when that new contract was called to its attention, granted a motion to remand the case. A copy of the order of remand is printed in the appendix submitted herewith.

A second or supplemental trial then took place and a new appeal was taken. The attached opinion of the Court of Appeals in that case shows that that court on the second appeal again held that its motion to remand was proper and that new evidence relating to the policy and intentions of the Administrator both in making the old contract and the new contract was admissable. The Court said:

> On November 30, 1935, *shortly before the appeal* in No. 3971 *was to be heard in this court, a contract was executed between the Administrator and the county abrogating the contract of December 8, 1934, and prescribing new terms and conditions for the making of the loan and grant, but not changing the amount of either of them. This contract eliminated those provisions of the old contract which had been held ultra vires the powers of a municipal corporation in Arkansas-Missouri Power Co.* v. *City of Kennett, Mo. (C. C. A. 8th) 78 Fed. (2d) 911, and also the provisions of the old contract which had been held by the court below to give the Administrator control over the rates*

to be charged by the county. A new provision designed to eliminate any contention that the loan and grant were made upon conditions not embodied in the contract, was inserted in the following language: "13. This agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the applicant and the government or any of its agencies in any way relating to said project." Under the terms of this contract the Administrator retained no control over the work to be done; but it was specified that certain conditions as to wages, hours of work, employment of convict labor, collective bargaining, etc., should be observed by the county and by contractors and subcontractors on the project.

Upon the contract of November 30, 1935 being called to our attention, *we immediately remanded the case to the court below to the end that that court might reconsider its decision in the light of the contract and take such further action as might be appropriate. This was done because in our opinion there was probability that the case had been rendered moot, at least as to some of the questions involved, by the execution of the new contract; and we thought that, in view of the changed situation, the lower court should be revested with jurisdiction of the entire cause, with power to enter such decree as might be deemed appropriate.*

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> *That the lower court may be thus revested with jurisdiction of the cause after the expiration of the term at which the decree appealed from was entered, in order that it* may give consideration to some phase of the case which it has overlooked or *may take into consideration matters which have occurred since the taking of the appeal, is too clear for discussion.* See *U. S.* v. *Anchor Coal Co.*, 279 U. S. 812; *Atherton Mills* v. *Johnston*, 259 U. S. 13; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 171, 172; *Wyant* v. *Caldwell*, (C. C. A. 4th) 67 Fed. (2d) 372; *Finefrock* v. *Kenova Mine Car Co.*, (C. C. A. 4th) 22 Fed. (2d) 627.

On the basis of the new contract and the sworn testimony (at the second or supplemental trial) of the Administrator (a Cabinet Officer of the United States) the Court of Appeals held that the contract was valid, and that the P. W. A. statute was constitutional and had been fully complied with.

There are printed in pages 64 to 95 and 96 to 124 of the Appendix submitted herewith copies of (1) the original contract between P. W. A. and Greenwood County, which this court will see was substantially like the old contract between P. W. A. and the city; and (2) the new contract between P. W. A. and Greenwood County, which this court will see is substantially the same (except as above noted as to rates) as the new contract between P. W. A. and the City, said new contract with Greenwood County being that which was held valid by the Court of Appeals for the Fourth Circuit.

7. In four cases in the United States Court of Appeals for the District of Columbia pending on appeal from final decrees in favor of this appellant, that Court, on similar motions, remanded the cases to the trial court. A copy of the order of remand dated December 19, 1935 in one of such cases (similar orders being entered in all the cases) is set forth in pages 59 to 63 of the Appendix, together with a copy of the opinion of the court in that case.

9. It has been frequently held that where a case, while on appeal, has become partly or wholly moot, because of intervening circumstances, the appellate court will take appropriate steps to meet the changed situation. Where the decree or judgment below was for the defendant and the case has become wholly moot, the appeal will be dismissed. Where the decree below was for the plaintiff, the case will be remanded with directions to vacate the decree and dismiss the suit, *United States* v. *Anchor Coal Co.*, 279 U. S. 812. Where the case has become partly moot because of altered circumstances, the appellate court will remand with directions to vacate the decree and for the taking of further testimony, irrespective of the fact that the term at which the decree was rendered has expired.

In *Atherton Mills* v. *Johnston*, 259 U. S. 13, the plaintiffs, father and son, filed a bill against the Atherton Mills alleging that the son was a minor and was about to be discharged by the defendant pursuant to the Child Labor Tax Act. The bill prayed for an injunction against the discharge,

claiming the statute to be unconstitutional. The District Court granted an injunction. During the pendency of the appeal, the son became of age. The Supreme Court held that the case was moot and reversed the decree with directions to dismiss the bill.

In *Patterson* v. *Alabama*, 294 U. S. 600, the Court said:

> We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, *the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.* We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case. *Gulf, C. & S. F. Ry. Co.* v. *Dennis*, 224 U. S. 503, 507; *Watts, Watts & Co.* v. *Unione Austriaca*, 248 U. S. 9, 21; *Dorchy* v. *Kansas*, 264 U. S. 286, 289; *Missouri ex rel. Wabash Ry. Co.* v. *Public Service Comm'n*, 273 U. S. 126, 131.
>
> Applying that principle of decision, we vacate the judgment and remand the case to the state court for further proceedings. [Italics supplied.]

See also *Board of Public Utility Commissioners* v. *Compania Generalia de Tobacos de Filipinos,* 249 U. S. 425; *Raferty* v. *Smith, Bell & Co.,* 275 U. S. 226; *Brownlow* v. *Schwartz,* 261 U. S. 216; *Paducah* v. *Paducah Water Co.,* 258 Fed. 20 (C. C. A. 8th); *Mills* v. *Green,* 159 U. S. 651.

Since the new contract is very substantially different from the old contract, this is not a case where parties defendant have abrogated an old contract with the intention of having a case involving that contract dismissed, and with either the secret or overt intention of thereafter entering into a new contract containing the same or substantially similar terms.

Accordingly, the case of *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290,[10] is not in point. In that case, suit had been brought by the United States under the Sherman Act against defendant railroad corporations which had entered into a contract alleged to be in restraint of trade. The contract showed that the parties were using an Association merely as a means of carrying out the alleged restraint of trade. The bill filed by the United States (as appears from the opinion of the Court, 166 U. S., at 308) asked not only for the dissolution of that Association but that the defendant railroads should be restrained from continuing in any like Association and should be enjoined from further combining. As the Supreme Court stated in its opinion (p. 308) the mere dissolution of the old Association was not the real object of this litigation.

[10] Cited by power companies in unsuccessful efforts to prevent remands in other like cases.

Judgment was entered in the trial court for the defendants. They moved to dismiss the appeal on the ground that, while the case was pending on appeal, the old Association had been dissolved. As the Supreme Court pointed out, the defendants, in bringing to the notice of the Supreme Court the fact of the dissolution of the old Association "took pains to show that such dissolution had no connection or relation whatsoever with the pendency of the suit, and that the Association was not terminated on that account. They do not admit the illegality of the agreement, nor do they allege their purposes not to enter into a similar one in the immediate future. On the contrary, by their answers *the defendants claim that the agreement is a perfectly proper, legitimate, and salutary one, and that it or one like it is necessary* to the prosperity of the companies. If the injunction were limited to the prevention of any action by the defendants under the particular agreement set out, or if the judgment were to be limited to the dissolution of the Association mentioned in the bill, the relief obtained would be totally inadequate to the necessities of the occasion, provided an agreement of that nature were determined to be illegal. The injunction should go further and enjoin defendants from entering into or acting under any *similar agreement* in the near future."

Moreover, as pointed out by the Supreme Court, the Government, in opposition to the motion to dismiss the appeal, showed that at the very same meeting

at which the Association was dissolved, a resolution was adopted that a committee be appointed "to draw up a *new agreement for the conduct of business now substantially covered by the Trans-Missouri agreement* and to make a report to all lines in the Trans-Missouri Association" in a meeting thereafter to be called. Pursuant to that resolution the defendants had *entered into a new agreement providing for a new Association to perform the same functions as the dissolved Association* (see 166 U. S. at 305).

These facts were referred to by the Supreme Court in its opinion (pp. 308, 309) as showing that the dissolution of the old Association could not affect the merits of the litigation in any possible way, inasmuch as there was a *mere change in form* and not in substance.

But in the case at bar, as above stated, there is far more than a mere change in form; the new contract is very substantially different in substance from the old.[11] In other words, this appellant, as distinguished from the defendants in the Trans-Missouri case, is not asserting that, although the contract involved in the suit has been abandoned, he intends to enter into

[11] Also, as above noted, and as our motion states, appellant desires to prove that, in determining that the new contract should be made, the Administrator considered only whether the proposed loan and grant and the new contract complied in all respects with the provisions of the federal statute and pertinent orders of the President, and that he gave no consideration to the rates attempted to be charged by the city, or to whether lower power rates were desirable, or whether it was desirable for the city to own and operate its own power plant.

a new contract virtually identical with the old contract, but, on the contrary, has advised this Court that the old contract has been abandoned and that the new contract—which he desires to execute and submit to the trial court—is in most important respects entirely different from the old contract, and that the Administrator's purposes and intention in determining to enter into that new contract are substantially different from those which, on the allegations of the appellee's bill, actuated him when authorizing the old contract to be sent to the city. Moreover, the appellant is not seeking to evade a determination of the facts by the trial court, but is urging that the trial court should hear evidence for the purpose of determining the existing facts.

In *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498,[12] there was before the court an order of the Interstate Commerce Commission, which by its terms was to run for a period of a little more than two years, requiring certain railroads to cease and desist from granting a certain shipper an alleged undue preference. While the case was on appeal it was contended that the order of the Commission had expired by lapse of time, that the case had therefore become moot, and that consequently the appeal should be dismissed. The court pointed out that "*orders of the Interstate Commerce Commission are usually continuing* (*as are manifestly those in the case at bar*) and their consideration ought

[12] Cited by power companies in unsuccessful efforts to prevent remands in other like cases.

not to be, as they might be, defeated, by *short term orders, capable of repetition, yet evading review*, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

Later decisions, however, show that where there is no such threat of repetition of the very act complained of, the court, because of changed circumstances, will remand a case which has become moot.

Thus in the later case of *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360, suit was brought by certain cable companies to enjoin the Postmaster General from interfering with their control of properties taken from them by the Government during the war. The District Court dismissed the bills for want of equity. While the cases were pending in the Supreme Court the Government called attention to the fact that the cable lines in question had been turned back to the plaintiffs. The companies objected to the case being considered as moot, on the ground that there was fear that their properties might again be wrongfully taken and because the Government might in the future assert that the revenues for the period during which the Government had operated the properties belonged to the United States. The court rejected that argument, stating:

> By appeals the cases were brought here and were argued and submitted in March last. While they were under advisement the United States directed attention to the fact that by authority of the President all the

cable lines with which the two corporations were concerned and to which the bills related had been turned over to and had been accepted by the corporations, and the Government hence had no longer any interest in the controversy. As the result of submitting an inquiry to counsel as to whether the cases had become moot, that result is admitted by the United States, but in a measure is disputed by the appellants for the following reasons: First, it is said that as the taking over of the lines by the President was wholly unwarranted and without any public necessity whatever, there is ground to fear that they may again be wrongfully taken unless these cases now proceed to a decree condemning the original wrong; and, second, that although it is true that during the operation of the property while under the control of the Government all the revenues derived from it were separately kept and have been returned to the owners of the property—a result which financially is satisfactory to them—nevertheless, unless there is a decree in this case, the owners can feel no certitude that the revenues may not be claimed from them by the United States in the future.

But we are of opinion that these anticipations of possible danger afford no basis for the suggestion that the cases now present any possible subject for judicial action, and hence it results that they are wholly moot and must be dismissed for that reason. In giving effect, however, to that conclusion, we are of opinion that the decrees below, which in sub-

> stance rejected the rights asserted by the complainants, ought not to be allowed to stand, but on the contrary, following the well established precedents (*United States* v. *Hamburg-American Co.*, 239 U. S. 466; *United States* v. *American-Asiatic S. S. Co.*, 242 U. S. 537), the decrees below should be reversed and the cases remanded to the lower court with directions to set aside the decrees and to substitute decrees dismissing the bills without prejudice and without costs, because the controversy which they involve has become moot and is no longer therefore a subject appropriate for judicial action (p. 362).

In *United States* v. *Anchor Coal Co.*, 279 U. S. 812 (a much later decision than those in the Trans-Missouri and Southern Pacific Terminal cases), the District Court (25 F. (2d) 462) had enjoined the enforcement of an order of the Interstate Commerce Commission, directing carriers to cancel certain rate schedules. The Court reversed the decree below and remanded the cause with directions to dismiss the bill saying:

> These appeals have been fully argued and considered, but in the present situation we find that they present moot issues and that further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the appeals would leave the injunction in force, at least apparently so, notwithstanding that the basis therefor has disappeared. Our action must, therefore, dispose of the cause, not merely of the appellate pro-

> ceedings which brought it here. The practice now established by this Court under similar conditions and circumstances is to reverse the decree below and remand the cause with directions to dismiss the bill. The order will be, therefore, that the decree is reversed with directions to the District Court to dismiss the bill of complaint without costs, because the controversy involved has become moot and, therefore, is no longer a subject appropriate for judicial action. *United States* v. *Hamburg-American Co.*, 239 U. S. 466, 475; *Berry* v. *Davis*, 242 U. S. 468, 470; *Board of Public Utility Comm'rs* v. *Compania General de Tobacos de Filipinas*, 249 U. S. 425; *Commercial Cable Co.* v. *Burleson*, 250 U. S. 360; *Heitmuller* v. *Stokes*, 256 U. S. 359; *Brownlow* v. *Schwartz*, 261 U. S. 216; *Alejandrino* v. *Quezon*, 271 U. S. 528, 535; *Norwegian Co.* v. *Tariff Comm'n* 274 U. S. 106, 112.

In *Kunze* v. *Auditorium Co.*, 52 Fed. (2d) 444 (C. C. A. 8th), an order had been entered by the trial court granting a temporary injunction against city officials restraining them from interfering with the exhibition of a moving-picture film. On the argument it appeared that the picture had been exhibited for a short time while under the protection of the temporary injunction and that there was no intention on the part of the plaintiff to attempt to show the picture again. The Circuit Court of Appeals remanded the case with directions to vacate the order and dismiss the bill on the ground that the case had become moot.

In *Watts, Watts & Co.* v. *Unione Austriaca &c.*, 248 U. S. 9, at 21,[13] the court said:

> This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. And in determining what justice now requires, *the court must consider the changes in fact* and in law *which have supervened since the decree was entered below.* [Italics supplied.]

10. We anticipate, from arguments made by plaintiff power companies in other cases where similar motions to remand have been made by this appellant and granted, that appellee in this case will call attention to the case of *Realty Acceptance Corporation* v. *Montgomery*, 284 U. S. 547. When the Greenwood County case was remanded by the Court of Appeals, the District Judge Watkins, after the second trial, wrote an opinion in which he indicated that the order of remand was improper, citing *Realty Acceptance Corporation* v. *Montgomery* and related cases, and, on the second appeal that case and related cases were cited by the plaintiff power companies who, on the basis of those cases, vigorously asserted that the order of remand had been improperly made. But as will appear from the language above quoted from the opinion of the Court of Appeals for the Fourth Circuit in the Greenwood case, the court again determined that the order of remand was entirely proper.

[13] This case is cited with approval in the recent case of *Patterson* v. *Alabama*, *supra*.

Plainly, it did do so because the cases cited by Judge Watkins and by the Plaintiffs in the Greenwood case are not at all in point, as appears from the following:

In *Realty Acceptance Corporation* v. *Montgomery, supra,* the District Court had entered a judgment in favor of the plaintiff. On appeal, the Circuit Court of Appeals entered an order of affirmance and dismissed the appeal. The defendant thereafter filed a petition in the Court of Appeals setting forth that at the trial the plaintiff had failed to disclose certain earnings which should have been taken into account in mitigation of damages; that these facts had been discovered after the appeal had been taken; that the mandate of the Court of Appeals should be stayed to afford the trial court opportunity to request the return of the record so that the judgment could be opened and a new trial granted on the issue of the *quantum* of damages. This petition was granted, and upon request of the District Court, the Court of Appeals made an order vacating its affirmance of the judgment and dismissing the appeal, thus returning the record to the District Court, which then entertained a motion for a new trial, and, on the basis of the newly discovered evidence, set aside the judgment and granted a new trial. The plaintiff then appealed from that order and the Court of Appeals found that its previous order vacating the order of affirmance was in error and reinstated the order affirming the original order of the trial court. The United States Supreme Court affirmed this order on two grounds:

(1) Since the term at which the judgment in favor of the plaintiff had been entered by the trial court had expired, the Appellate Court did not have power to remand the case *solely* for the hearing of new evidence as to *facts which existed prior to the entry of the judgment* (citing *Roemer* v. *Simon*, 91 U. S. 149).

(2) There was what the Supreme Court called "*a further conclusive reason*", viz, that the motion to remand the case was made after the Court of Appeals had dismissed the appeal. As to this point, the Supreme Court said:

> This action was final, ended the case in that court, and deprived it of all power to add to or alter the record as certified. Since there was no case pending power was wanting to make any order granting leave to the court below for any purpose. The attempt by remanding the record with leave to the court below to take action which would otherwise have been beyond its powers left the matter precisely as if no such order had been made.

As that was a "conclusive reason" for its decision, the balance of the opinion may be regarded as dictum, and certainly as amply justifying the statement that it is not to be considered as inconsistent with numerous other decisions of the Supreme Court cited by us.

But even assuming that this "conclusive reason" was not the sole basis for the court's decision, and restricting attention for the moment to the other reason given by the court, it is obvious that appellee has entirely misconstrued that decision. The basis of the motion for remand in that case was that, at

the trial in the trial court, "the respondent had failed to disclose certain earnings of which he had been in receipt, which should have been taken into account in mitigation of damages", and "that this fact had been discovered after appeal from the judgment." On that basis, the Court of Appeals was asked to remand, so that the judgment could be opened and a new trial be granted on the issue of quantum of damages (284 U. S. 548–549). In other words, the sole basis for the remand was to enable evidence to be introduced as to facts which existed prior to the entry of the judgment of the trial court. The Supreme Court stated that the applicable section of the Judicial Code does not warrant a reversal of a judgment or decree solely for that purpose. The Court did not indicate that an order of remand should not be made for the purpose of hearing evidence as to events occurring subsequently to the time of the entry of the trial court's judgment or decree. The court (284 U. S. 550–551) carefully pointed out that the Judicial Code authorizes a remand to the lower court with directions to open the judgment, and that in such a case the trial court may receive new evidence saying:

> The section has been construed as applying to cases where a judgment or decree is affirmed upon appeal and further proceedings in the court below are appropriate in aid of the relief granted. And the statute warrants the giving of directions by an appellate court for further proceedings below in conformity with a modifi-

> cation or a reversal of a judgment where, in consequence of such action, such proceedings should be had.

In support of that statement the Court cited with approval *Kendall* v. *Ewert*, 259 U. S. 139. In that case the Court of Appeals remanded the case to the trial court for the purpose of taking evidence as to matters which occurred after the case was on appeal. This was approved by the Supreme Court, which based its decision largely upon such new evidence. It is clear, therefore, that in the *Realty Acceptance* case the Court certainly went no further, at most, than to hold that a case should not be remanded *solely* for the purpose of taking new evidence as to matters which had occurred prior to the entry of the decree.

The plaintiff power companies in the Greenwood case took the position that the *Realty Acceptance* case is to the effect that, in the absence of error by the trial court, an appellate court can never remand a case, after the expiration of the term at which the trial court entered its final judgment or decree, in such a way as to permit the taking of any evidence, whether as to old matters or new. It is clear that at most, the first ground of the decision in the *Realty Acceptance* case does not go that far: at most, it holds that such an order of remand cannot be made *solely* for the purpose of taking new evidence as to *matters which occurred prior to the entry of the judgment or decree* of the trial court, if the term at which that

judgment or decree was entered, has expired. The decision in that case can be explained entirely upon the second "conclusive reason." But even if it be assumed that the true basis of that decision was the first reason given by the Supreme Court, it can clearly have no application to a case where the basis for remanding is the *occurrence of new matters after the entry of the judgment or decree of the trial court.* Otherwise, it would be impossible for an Appelate Court ever to remand a case with directions to vacate a judgment or a decree, after the term has expired, because of the occurrence of new events making the case moot in whole or in part. As the United States Supreme Court has frequently remanded cases under such circumstances, it is impossible to believe that the *Realty Acceptance* case was designed to prevent such action. It should be noted that such an order of remand was made in *Patterson* v. *Alabama*, 294 U. S. 600, decided after the decision of the *Realty Acceptance* case.

Moreover, in view of the second ground of the decision in the *Realty Acceptance* case, there is good reason to believe that the first ground of that decision was more or less in the nature of dictum and could not have been intended as a decision to the effect that, in the absence of error by the trial court, an appellate court can never remand a case for the taking of further evidence even as to matters which occurred prior to the entry of the decree of the trial court and prior to the expiration of the term at which it was entered. For such a ruling would

be squarely in the teeth of the long line of cases such as *Estho* v. *Lear*, 7 Pet. 130; *Chicago, M. & St. P. Ry. Co.* v. *Tompkins*, 176 U. S. 167, 179; *United States* v. *Rio Grande, etc., Co.*, 184 U. S. 416; *Lincoln Gas Co.* v. *Lincoln*, 223 U. S. 349; *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387. In those and related cases the Supreme Court has repeatedly held that it may remand a case and reverse the decree because the facts before it are not sufficient to enable it to do justice to the parties.

Thus in *United States* v. *Rio Grande Dam and Irrigation Company*, 184 U. S. 416, the Court said (424):

> In *Illinois Central R. R. Co.* v. *Illinois*, 146 U. S. 387, one of the questions arising in the pleadings was whether the Illinois Central Railroad Company was entitled to maintain certain docks, piers, and wharves on the lake front at Chicago. The circuit court decided that question in favor of the railroad company. But this court was of opinion that the evidence in the record was not adequate for the determination of that question, and upon its own motion reversed the decree and remanded the cause with directions for further investigation, so as to enable the court to determine whether the structures in question extended into the lake beyond the point of practical navigability having reference to the manner in which commerce was conducted on the lake.

That the *Realty Acceptance* case cannot have been intended to overrule such cases is clearly demonstrated by the fact that in *Borden's Farm Products*

Company v. *Baldwin*, 293 U. S. 194—decided some two years ago after the *Realty Acceptance* case—the Supreme Court (293 U. S. 194, at 213) referred to and relied upon "well-established precedents", citing *Estho* v. *Lear; Chicago, M. & St. P. Ry. Co.* v. *Tompkins; United States* v. *Rio Grande, etc., Co.;* and *Lincoln Gas Co.* v. *Lincoln.*

The doctrine of these cases has been frequently applied by the Circuit Courts of Appeal.

In *Finefrock* v. *Kenova Mine Car Co.*, 22 F. (2d) 627 (C. C. A. 4th), after a trial on the merits, the District Court dismissed the bill, which alleged a breach of trust. The Circuit Court of Appeals for the Fourth Circuit found that the evidence did not support the allegations of the bill, but that it might show a fraudulent conveyance within the terms of a pertinent West Virginia statute. However, the bill "was not based upon the West Virginia statute, and it was not considered by the parties either in their pleadings or in the arguments at the bar." Accordingly, the Court of Appeals remanded the case to the District Court and said (p. 634):

> We think that the proper action on this branch of the case is to remand it without final decision to the District Court for further proceedings, in which, if the parties desire it, the pleadings may be amended, additional evidence may be taken, and the defendants may have full opportunity to present their defense. There is abundant authority for the proposition that the appellate court has power, without determining and disposing of a case, to

> remand it to the lower court for further proceedings, if the case has been tried on a wrong theory, or the record is not in condition for the appellate court to decide the questions presented, with justice to all the parties concerned. *Coombs* v. *Hodge*, 21 How. 397, 16 L. Ed. 115; *Wiggins Ferry Co.* v. *Ohio & Miss. R. Co.*, 142 U. S. 396; 12 S. Ct. 188, 35 L. ed. 1055; *Jones* v. *Meehan*, 175 U. S. 1, 20 S. Ct. 1, 44 L. ed. 49; *N. Y. Central & N. R. Co.* v. *Beaham*, 242 U. S. 148, 37 S. Ct. 43, 61 L. ed. 210; *U. S. v. Rio Grande Dam Co.*, 184 U. S. 416, 423, 22 S. Ct. 428, 46 L. ed. 619; *Rio Grande Dam & Irrigation Co.* v. *U. S.*, 215 U. S. 266, 275, 30 S. Ct. 97, 54 L. ed. 190; *U. S.* v. *Shelby Iron Co.*, 273 U. S. 571, 47 S. Ct. 515, 71 L. ed. 781.

In *Underwood* v. *Commissioner of Internal Revenue*, 56 F. (2d) 67 (C. C. A. 4th, 1932) the Court of Appeals for the Fourth Circuit remanded for rehearing a determination of the Board of Tax Appeals. The Court said (p. 73):

> In a number of instances, Circuit Court of Appeals have remanded cases for rehearing when it seemed necessary in order to do justice to the parties. It does not appear in these cases that new evidence was available; but in the instant case the evidence is known to exist and it would be an abuse of discretion to decline to receive it. * * * In addition, there is the well-established rule that an appellate court has the power, without determining and disposing of a case, to remand it to the lower court for further proceedings, if

the case has been tried on a wrong theory, or the record is not in condition for the appellate court to decide the question presented with justice to all parties concerned. See *Finefrock* v. *Kenova Mine Car Co.* (C. C. A.) 22 F. (2d) 627, 634, and cases cited; also *Seufert Bros. Co.* v. *Lucas* (C. C. A.) 44 F. (2d) 528.

See also to the same effect:

Wyant v. *Caldwell*, 67 F. (2d) 374 (C. C. A. 4th 1933).

Peterlini et ux. v. *Memorial Hospital Association of Monongahela*, 232 Fed. 359 (C. C. A. 3d 1916).

Pfeil v. *Jamison*, 245 Fed. 119 (C. C. A. 3d 1917).

Columbus Gas & Fuel Co. v. *City of Columbus*, 55 F. (2d) 56 (C. C. A. 5th, 1931).

Delaware & Hudson Co. v. *Stankus*, 63 Fed. (2d) 887, cited by District Court Judge Watkins (and the plaintiffs) in the Greenwood case, related to a request for a remand, *solely* for the purpose of considering testimony as to *matters which were in existence prior to the entry of the decree* by the trial court; it therefore has no application to our motion for the reasons above stated.

Jensen v. *New York Life Insurance Co.*, 59 Fed. (2d) 957, cited by District Court Judge Watkins (and the plaintiffs) in the Greenwood case, was decided shortly after the *Realty Acceptance case* had been decided, and is out of line with the *Borden's Farm case* and the numerous other cases cited above: It was decided before the *Borden's Farm case* and before other cases cited by us (as to the propriety of

a remand where material events and changes have occurred after the decree of the trial court has been entered). It ignores the doctrine of *Estho* v. *Lear* and related cases which, as above noted, were reaffirmed in the *Borden's Farm case*. Moreover, the *Jensen case* is out of line with the recent decisions of the Court of Appeals for the District of Columbia and the Court of Appeals for the Fourth Circuit (relating to motions for remand virtually identical with those made in this case), courts which have had an opportunity to consider the true significance of the *Realty Acceptance case* in the light of the subsequent *Borden's Farm case*. It was decided before *Alabama* v. *Patterson*, 294 U. S. 600, 607.

In the *Greenwood County case*, as above noted, the Circuit Court of Appeals for the 4th Circuit has twice decided that such an order of remand as we seek in this case is entirely proper. It did so although fully aware of the *Realty Acceptance* case. This is indicated not only by the fact that that case was cited to the Court in the *Greenwood County* case by the plaintiffs in that case, but also by the following:

After that Court had decided the *Finefrock* case and the *Underwood* case, *supra*, there came before it, the case of *Chisholm-Ryder Co.* v. *Buck*, 65 F. (2d) 735. In that case, while an appeal, the plaintiff made a motion that the Court of Appeals should itself receive and consider as part of the record, certain evidence not presented to the trial court but constituting cumulative evidence. Instead of asking

the Court of Appeals to remand the case to consider such new evidence, a motion was made that the Appellate Court itself should consider that evidence. The Court of Appeals in denying that motion said:

> * * * *We are not required to decide whether this evidence might have been made available in some other way, but merely whether it should be received at this time in this Court.*

In discussing that question the Court of Appeals cited and discussed the *Realty Acceptance* case. It is therefore obvious that the Court had the *Realty Acceptance* case fully in mind when, but a short time thereafter, it decided the case of *Wyant* v. *Caldwell*, 67 Fed. (2d) 374. In that case the Court reasserted the doctrine of the *Finefrock* case, holding that the record on appeal from a decree confirming a report of a Special Master was insufficient as a basis for review and remanded the case for complete findings of fact, saying:

> It is impossible for us to pass upon the case in any adequate way on the record before us; and we shall accordingly remand it to the court below, with directions to find the facts fully as to the disputed matters, * * * and to reconsider carefully the allowance to the receiver for his service as well as the credits allowed for payments made to the manager and his relatives, and with power to make such modifications in the decree as may be proper.

The Supreme Court in the *Realty Acceptance* case pointed out that where there is a proper basis for remanding a case, then the judgment or decree

entered by the trial court is opened up and vacated, a new term begins, and the expiration of the term in which the earlier decree was entered is no bar to the taking of further testimony by the trial court, as to matters which occurred either before or after the expiration of the term at which the earlier decree was entered.

It is true that, if an order of remand is improperly made, it is legally void, and accordingly, no further testimony can be taken by the trial court if the term has expired. But in a case (such as the *Borden's Farm case* or *Patterson* v. *Alabama, supra,* for instance) where the appellate court properly and validly remands the cause, there can be no question that further evidence may be heard by the trial court. See *John Simmons Co.* v. *Grier Brothers Co.,* 258 U. S. 82; *Messenger* v. *Anderson,* 225 U. S. 436; *Luminous Unit Co.* v. *Freeman-Sweet Co.,* 3 Fed. (2d) 577 (C. C. A. 7th Circuit 1924); *Johnson* v. *Cadillac Motor Co.,* 261 Fed. 678 (C. C. A. 2nd 1919); *Rogers* v. *Hill,* 289 U. S. 582, 586–588; *Rogers* v. *Chicago, Rock Island and R. R. Co.,* 39 Fed. (2d) 601, 604 (C. C. A. 8th Circuit); *Chase* v. *United States,* 256 U. S. 1, 10; *Remington* v. *Central Pacific R. R. Co.,* 198 U. S. 96; *Riehle* v. *Margolies,* 279 U. S. 218; *American Surety Co.* v. *Bankers Saving and Loan Association,* 67 Fed. (2d) 803 (C. C. A. 8th); *King* v. *West Virginia,* 216 U. S. 92, 100.

And the same is true where a remand is justified because of new matters which have occurred since the entry of a decree by a lower court. See the por-

tion of the opinion of the Court of Appeals in the *Greenwood County case*, quoted above, page 32; see also cases cited above pages 33 to 35 and 39 to 43.

For the reasons above noted, if and when this case is remanded and the remand order is docketed, a new term will begin, and the expiration of the term, at which the earlier decree was made, will be no bar to the taking of testimony. The case of *Realty Acceptance* v. *Montgomery* has no application in such circumstances.

11. Arguments advanced by plaintiffs in other cases in which similar motions asking an order of remand have been made by this appellant and granted, indicate that appellee will probably argue as if there were something improper about the effort of P. W. A. and the city to meet objections to the old contract made by the District Court and to meet objections made to that form of contract by other courts in similar cases. Such an argument is not tenable, for P. W. A. and the city have agreed upon a new contract (to be executed, if and when the decree is appropriately modified) eliminating most of the provisions of the old contract found invalid by the trial court, *in an effort to make the contract conform, so far as possible, to the decision of that court.*

What the appellants are endeavoring to do, is, indeed, in considerable part, in compliance with the decree. They are seeking—subject to the injunction order—to enter into a new contract eliminating many of the provisions which the trial court in its opinion and decree found invalid. This does not

mean that appellants agree that the decree was in all respects correct. But, without agreeing in all respects to the correctness of that decree, this appellant and P. W. A. are trying so far as possible to comply with it.[14]

It is difficult to see how the appellants could show greater respect for the decree of the trial court. The Administrator is frank to say that he desires to make a contract which is in all respects legal, and, accordingly takes the position that, if any court finds that the provisions of this contract are illegal, it is in no way improper for him to modify them in accordance with such judicial decision. If the trial court, on the remand of this case, should find that some of the provisions of the new contract are invalid, there surely would be no impropriety on the part of the appellants, if they then sought to eliminate those provisions of the new contract. Such revisions of their contract cannot conceivably hurt appellee,

[14] See *American Book Co.* v. *Kansas*, 193 U. S. 49. There, in quo warranto proceedings, a judgment was entered ousting a foreign corporation from doing business in the State of Kansas until it should satisfy requirements of the Kansas laws with reference to foreign corporations. After the judgment was entered, the corporation complied with the judgment. On that basis a motion was made by the State of Kansas to dismiss the corporation's appeal. The corporation answered this motion by stating, inter alia, that it had been coerced into compliance by the judgment to avoid injury from the loss of contracts to be performed in Kansas. The Supreme Court dismissed the appeal, citing *Mills* v. *Green*, 159 U. S. 651, on the ground that compliance with the judgment rendered the case moot, and that it made no difference that the corporation had complied because it felt coerced by the judgment.

since appellee will be entirely protected by the injunction decree.

Appellants are not trying to circumvent the courts, or to avoid an adjudication of the rights of appellants and appellee, or to present to this court an abstract question. The situation is exactly the contrary. They are seeking a trial based on the new contract and other relevant testimony.

The argument (advanced in other like cases) that, if the order to remand is made, the city and the Administrator may thereafter again revise their contract to comply with a new decree of the trial court to the injury of appellee, might have some weight if the appellee were being injured by the pendency of this suit, but can have no weight in view of the fact that appellants are and presumably will be enjoined from carrying out any contract pending a final decree in this suit. Such an argument was vigorously made but unsuccessfully by the plaintiff power companies in opposition to the motions to remand the cases pending in the Court of Appeals for the District of Columbia and in the Greenwood case. With that argument before them, the courts in those cases entered the orders to remand, copies of which are printed in pages 57 to 63 of the Appendix filed herewith.

The orders of remand entered by the United States Court of Appeals for the District of Columbia provided that the injunction entered by the lower court should remain in effect until the further order of the

Court of Appeals.[15] We would have no objection to a like order being entered by this court, provided the injunction be modified to permit the execution of the new contract.

In view of the foregoing considerations, we respectfully submit that this case be remanded as prayed.

JAMES W. MORRIS,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
JOHN W. SCOTT,
Special Assistant to the Attorney General.
JEROME N. FRANK,
Counsel for the Federal Emergency Administrator of Public Works.

[15] In those cases, the injunction decree permitted the execution (as distinguished from the performance) of new contracts.

EXHIBITS

EXHIBIT 1

New Proposed Contract

LOAN AND GRANT AGREEMENT BETWEEN THE CITY OF COEUR D'ALENE, IDAHO, AND THE UNITED STATES OF AMERICA (P. W. A. DOCKET NO. 6695)

It is hereby agreed by and between the United States of America (herein called the "Government") and the City of Coeur d'Alene, Idaho (herein called the "Applicant") as follows:

1. *Loan and Grant.*—The Government will aid in financing the construction of a water system, including sinking wells, installing pumps, and a distributing system for water service, and a Diesel engine generating plant and electric distributing system (herein called the "Project"), by making a loan and grant to the applicant in an amount not exceeding in the aggregate the sum of $650,000.

2. *Method of Making Loan.*—The Government will purchase, at the principal amount thereof plus accrued interest, from the Applicant, obligations of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $504,000, less such amount of such obligations, if any, as the Applicant may sell to purchasers other than the Government:

(a) *Obligor.*—City of Coeur d'Alene.

(b) *Type.*—Negotiable general obligation coupon bond.

(c) *Denomination.*—$1,000.

(d) *Date.*—September 1, 1934.

(e) *Interest Rate and Interest Payment Dates.*—4 percent per annum, payable semi-annually on March 1 and September 1.

(f) *Place of Payment.*—At the office of the City Treasurer Coeur d'Alene, Idaho, or, at the option of the holder, at a bank or trust company in the Borough of Manhattan, City and State of New York.

(g) *Registration Privileges.*—Registerable as to both principal and interest.

(h) *Maturities.*—Payable, without option of prior redemption, on September 1 in years and amounts as follows:

Year	Amount	Year	Amount
1936	$18,000	1946	$27,000
1937	19,000	1947	28,000
1938	20,000	1948	29,000
1939, 1940	21,000	1949	30,000
1941	22,000	1950	32,000
1942	23,000	1951	33,000
1943	24,000	1952	34,000
1944	25,000	1953, 1954	36,000
1945	26,000		

(i) *Security.*—Payable as to both principal and interest from ad valorem taxes which may be levied without limit as to rate or amount upon all the taxable property within the territorial limits of the Applicant.

3. The Government will make a grant in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. The Government will make part of the grant by payment of money and the remainder of the grant by cancellation of obligations purchased pursuant to this agreement or interest coupons attached thereto. If all of said obligations are sold to purchasers other than the Government, the Government will make the

entire grant by payment of money. In no event shall the grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $175,000.

4. *Conditions Precedent.*—The Government will be under no obligation to take up and pay for any bonds which it herein agrees to purchase or to make any grant:

(a) *Financial Condition.*—If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government;

(b) *Cost of Project.*—If it appears that the Applicant will not be able to complete the Project described in this agreement for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, shall be necessary to complete the Project;

(c) *Plans and Specifications and Certificate of Purposes.*—If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to comply with Title II of the National Industrial Recovery Act in all respects.

5. *Interest of Member of Congress.*—No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this agreement, or to any benefit to arise thereupon.

6. *Bonus or Commission.*—The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of the application.

7. *Information.*—The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 percent of the bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.*—The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 percent of the bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the bonds.

9. *Name of Project.*—The Applicant shall not name the Project for any living person.

10. *Grant and Bond Payments.*

(a) *Advance Grant.*—Upon execution of this agreement, the Applicant may request an advance on account of the grant in an amount not exceeding 5 percent of the estimated cost of labor and materials to be employed on the Project. The request for this advance grant shall be accompanied by a signed certificate of purposes in which shall appear in reasonable detail the purposes for which such advance grant will be used;

(b) *Payment for Bonds.*—A requisition requesting the Government to take up and pay for bonds will be honored as soon as possible after such bonds are ready for delivery, if the

bond transcript and other documents supporting such requisitions are complete;

(c) *Intermediate Grant Requisitions.*—Simultaneously with the delivery of and payment for the bonds by the Government, or, when bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant has so requisitioned and if such requisition is accompanied by a signed certificate of purposes showing in reasonable detail the purposes for which the funds will be used, and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount representing the difference between the advance grant and an amount equal to 15 percent of said previously estimated cost of labor and materials to be employed upon the Project. When the Project shall be approximately 70 percent completed the Applicant may file its requisition for an additional grant in an amount which, together with the amount previously paid on account of the grant, is equal to 25 percent of the cost of labor and materials theretofore employed on the Project, but in no event in an amount exceeding the amount set forth in paragraph 3 hereof.

The intermediate grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this agreement relating thereto;

(d) *Final Grant Payment.*—At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together with all previous payments on account of such grant, shall be

an amount not in excess of 30 percent of the actual cost of labor and materials employed upon the Project, and not to exceed, in any event, the amount of the grant set forth in paragraph 3 hereof. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this agreement relating thereto;

(e) *Construction Account.*—A separate account or accounts (herein collectively called the "Construction Account") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The grant payments, the proceeds from the sale of the bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project shall be deposited in the Construction Account promptly upon the receipt thereof. All accrued interest paid by the Government at the time of delivery of the bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(f) *Disbursement of Moneys in Construction Account.*—Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to purchase bonds, if any of the bonds are then held by

the Government, or be transferred to the Bond Fund.

(g) *Use of Moneys in Bond Fund.*—Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of the bonds purchased pursuant to this agreement.

11. *Construction of Project.*—It is mutually agreed that the Project will be constructed in accordance with the following principles:

(a) That, in order to insure completion of the Project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the risk and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the Project, unless it is required by the laws of Idaho that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% of the contract price will be adequate.

(b) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance in amounts reasonably sufficient to protect the contractor.

(c) That minimum or other wage rates required to be predetermined by the law of Idaho or local ordinance shall be predetermined by the Applicant in accordance therewith, and incorporated in the appropriate

contract documents. In the absence of applicable law or ordinance, the Applicant shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the Project, and incorporate them in the appropriate contract documents.

(d) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(e) That all work to be performed under contracts to be let hereafter shall be performed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the Project. (Exhibit A has been so worded that the provisions thereof may, if the Applicant desires, be inserted verbatim in such construction contract or contracts.) If any of the provisions contained in Paragraphs 5 to 16, inclusive, of Exhibit A shall be held invalid, such invalidity shall not affect the validity and effectiveness of the other provisions of this agreement.

12. The Administrator shall have no rights or power of any kind with respect to the rates to be fixed or charged by the Project.

13. This agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relat-

ing to said Project or to the financing or construction thereof.

In Witness Whereof, the Applicant and the Government have respectively caused this Agreement to be duly executed as of ----------, 1936.

CITY OF COEUR D'ALENE,

By ——— ———,

UNITED STATES OF AMERICA,

Federal Emergency Administrator of Public Works.

By ——— ———,

Assistant Administrator.

[SEAL]

Attest:

——— ———.

Exhibit A

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative, and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week; *Provided*, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade Occupation:	*Hourly Wage Rate*
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(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: *Provided, however,* That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of _____ to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of _____, should such deductions be made, shall be posted in a prominent and easily accessible place

at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.' "

3. (*a*) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivisions and/or county) _____ and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) _____ *Provided,* That these preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(*b*) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(a) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compensation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide _____ for the protection of his employees not otherwise protected.

(b) *Public Liability and Property Damage Insurance.*—The Contractor shall take out and maintain

during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

> Public Liability Insurance in an amount not less than $_____ for injuries, including wrongful death, to any one person, and, subject to the same limit for each person, in an amount not less than $_____, on account of one accident, and Property Damage Insurance in an amount not less than $_____.

Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this subparagraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

---

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any

contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcontractors, material men, or suppliers shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials,

articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;
On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.*—The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls

from the 15th of the previous month to the 15th of the current month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendable equipment, to the extent of 90 percent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the sub-

contractor, to the extent of the subcontractor's interest therein.

13. *Signs.*—The contractor shall furnish signs bearing the legend:

FEDERAL PUBLIC WORKS PROJECT NO. —

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor without the consent of surety unless the surety has waived its right to notice of assignment.

15. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the contractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of its intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing of such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the Contractor, and the contractor

and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

16. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130 hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects fall within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1 (b):

And provided further.—It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1 (b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

Regulations issued pursuant to so-called "kick-back statute"

Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Secretary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

54604—36——6

SECTION 1. Said Act reads as follows:

> "To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.
>
> "*Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,* That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.
>
> "SEC. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week."

SECTION 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during

the preceding week. Said affidavit shall be in the following form:

State of _____
County of _____, *ss:*

I, _____ (name the party signing affidavit), _____ (Title), do hereby certify that I am (the employee of) _____ (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of _____ (project) for the weekly pay roll period from the _____ day of _____, 193__, to the _____ day of _____, 193__, that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above-named project.

Sworn to before me this _____ day of _____, 193__.

SECTION 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached, to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

SECTION 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who supervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice-president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

SECTION 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

SECTION 6. These regulations shall become effective on January 15, 1935.

The clause in the payroll affidavit which reads "* * * that the attached payroll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * *" is construed by the Public Works Administration to mean:

(a) Wages due are the wages earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause "* * * that no rebates or deductions from any wages due any such person as set out on the attached payroll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment suppliers engaged in installation of the equipment at the site of the project.

Penalty

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for know-

ingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * *" relating to any matter within the jurisdiction of any governmental department or agency.

EXHIBIT 2

FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS,
Washington, D. C., March —, 1936.

THE CITY OF COEUR D'ALENE,
Coeur d'Alene, Idaho.
(*Attention the Mayor.*)

GENTLEMEN: On November 23, 1934, you executed a contract sent you by Federal Emergency Administration of Public Works. Because of the institution of the suit by the Washington Water Power Company in the Federal District Court in Idaho that contract was never executed on behalf of the United States.

In August 1935 the United States Circuit Court of Appeals for the 8th Circuit decided the case of *Arkansas-Missouri Power Co.* v. *City of Kennett*, now reported in 78 Fed. (2d) 911. The Director of the Legal Division of P. W. A. subsequently called that case to my attention. It held that if the city signed a standard form of P. W. A. contract, then under the laws of Missouri the city was acting ultra vires, because the city was delegating legislative power with reference to the construction of its plant. While the correctness of that opinion seemed to be doubtful, and particularly in the possible application in other states, it seemed desirable to change our form of contract, so as to avoid the difficulties created by that decision by eliminating the features of the contract which had occasioned it. I, therefore, au-

thorized the drafting of a new form of contract to accomplish that end. Many persons in P. W. A. had to be consulted, and although negotiations with several cities began in the latter part of August 1935, it was not until the latter part of September that the new form of contract had been worked out and approved by me. It took the form of an offer for a unilateral contract. On September 25, 1935, the old contract with the City of Hominy, Oklahoma, was abrogated and an offer in the new form was made by P. W. A. to that city. The old contract was involved in a suit then pending on appeal in the Court of Appeals for the District of Columbia, entitled "*Oklahoma Utilities Co.* v. *Ickes*"; the attention of the Court of Appeals was called to the new contract by a motion made in that case, and the case was remanded to the lower court.

Meanwhile there were negotiations with other cities with which P. W. A. had contracts, and abrogating agreements were thereafter signed and new offers made.

However, in the early part of November, in connection with the writing of the brief on my behalf as appellant in the case relating to the County of Greenwood, South Carolina, pending in the Court of Appeals for the 4th Circuit, my attention was called to the findings of the District Court and to the fact that that court had entered a decree against P. W. A. in large part because of certain provisions relating to rates. Those rates provisions had not been eliminated in the new form of contract. It was then decided that our former contract should be further revised so as to eliminate those provisions, in the belief that, even if the District Court in the Greenwood case had correctly interpreted those provisions

of the contract, which we denied, the decision would be reversed as a result of the elimination of those provisions. Accordingly, I authorized work to be done on a new revised form of contract. This again took a considerable amount of time.

The first of the new contracts in the revised form to be executed was with the County of Greenwood which was executed on November 30, 1935. As there were a large number of such contracts outstanding, negotiations with you for the execution of a contract in revised form were not begun until on or about December 23, 1935, by which time a decree enjoining you and me from proceeding with the contract of November 23, 1934, had been entered by the Federal District Court and an appeal had been taken therefrom.

Since December 23, 1935, some of my subordinates have been corresponding and conferring with your representatives with a view to the execution by you and the United States of a new contract which would be subject to the injunction decree and would not be effective unless and until that decree were vacated or appropriately modified. After much consideration you decided that you would not execute such a new contract unless and until the injunction decree had been vacated or appropriately modified so as to permit its execution.

My reasons for desiring to enter into a new contract with you are not merely those which actuated me in approving the new form of contract above referred to but also the following considerations: When I authorized the contract to be sent to you, which you signed on November 23, 1934, and when certain letters and telegrams introduced in evidence in the suit now pending on appeal were sent out

by me or my subordinates, I did not have called to my attention by my subordinates, and therefore did not have in mind, the fact that your bonds were to be general obligation bonds payable out of taxes.

In a case where P. W. A. makes a loan to the city to be evidenced by revenue bonds, the sole security for the loan consists of the earnings of the project constructed by means of funds supplied by the United States. Under Title II of the National Industrial Recovery Act, no loans can be made which are not reasonably secured Consequently, if the sole security consists of such revenues, I am obligated in deciding whether the loan should be made, to consider the prospective earnings of the project and it is therefore necessary for me to take into account the prospective rates that will be charged by the city and also to some extent the prospective rates that will be charged by the city's competitors, because prospective competitive rates may affect the earning power of the project and therefore the security of the loan.

Even in a case where the bonds are revenue bonds, our present revised form of contract provides that the United States shall have no rights or power of any kind with respect to the rates to be charged by the city, excepting only such rights as it may have as a holder of the revenue bonds under the laws of the State.

But where, as in your case, the loan is to be evidenced by general obligation bonds of the city, then, in determining the security of the loan, there needs to be considered merely the financial condition of the city generally and (except in unusual instances where a bad investment by the city in a project may seriously impair its finances) P. W. A. has

ignored the prospective revenues of the proposed project and therefore likewise has ignored the rates of the city and of its competitors.

As you can well imagine, I am occupied with a multitude of duties daily and occasional errors are therefore unavoidable. Because of that fact an error was made in including, in the contract with you, provisions with respect to the rates of the city; and for like reasons I approved without adequate consideration, an attitude, expressed in the letters and telegrams above referred to, suggested by some of my subordinates with respect to the rates and services of The Washington Water Power Company. I reached the conclusion several months ago that that attitude was entirely unjustified and have completely repudiated and abandoned it. I reached that conclusion when my attention was first again directed to the old contract and those letters and telegrams by reading for the first time, when the case was on appeal, the opinion of the District Court in the case brought by The Washington Water Power Company. I regret that I did not read that opinion sooner, but must again explain that my multitude of duties makes it impossible for me to keep constantly and closely in touch with the very considerable number of suits in which, as Administrator, I am involved.

I then concluded that, unless a new contract could be made with you which could be justified without any regard to such considerations as the rates or services of the city or of The Washington Water Power Company, I would be obligated to rescind the allotment on which the old contract of November 23, 1934, had been based. Had I so acted, there would, of course, be no contract whatsoever, for the old contract has never been executed and is, therefore, not in

effect. Upon reconsidering the project I approved the making of a new contract with you in the form herewith enclosed. In giving that approval I have considered solely (a) whether the project would be a proper part of the comprehensive program of Public Works, (b) whether your general obligation bonds would be reasonably secured, (c) whether the project would help adequately to increase employment, and, (d) other factors required to be considered by Title II of the National Industrial Recovery Act and the applicable Executive Orders of the President. I have not given any consideration whatsoever to any other factors and especially have not considered (1) the rates which may be charged by you, (2) the rates or service of the power company, (3) whether lower power rates are desirable, (4) whether it is desirable that you should own and operate your own power plants—these all being matters for your consideration.

I have no intention of ever executing the old contract or any contract containing those terms of that contract which are not also contained in the new attached contract. My position is that I have waived irrevocably all those provisions of the old contract not set forth in the new, and have completely abandoned, and regret that there was ever expressed by or for me, any intention to have any control of any kind of your rates or any interest in the rates or services of the power company or of the city.

I feel strongly that the constitutionality of the PWA statute (affecting the lives of millions of persons) should not be determined in a case involving a proposed contract containing certain of the provisions contained in the old proposed contract, and the approval of which was based upon the consideration of improper factors, I have therefor been con-

sidering whether it would not be for the best interests of the United States that the allotment upon which your contract was based should be rescinded so that there would be no contract, in which event the case above referred to now pending on appeal would be wholly moot. Because it might be unfair to you, I have concluded that, instead of taking such a step, I will ask my attorneys to file in the Court of Appeals a motion calling attention to the facts set forth in this letter, to the proposed new contract, and to other relevant facts, and asking the Court of Appeals to vacate the decree of the lower court and remand the case in such a way as to permit the execution of the new contract and a new trial based thereon, at which trial evidence will be introduced in accordance with the foregoing.

It is my understanding that, if and when the present decree is vacated or appropriately modified, you will join with me in executing the enclosed new contract.

HAROLD L. ICKES,
Administrator.

U. S. GOVERNMENT PRINTING OFFICE: 1936

No. 8097

In the United States Circuit Court of Appeals for the Ninth Circuit

LEE BOW SING and LEE BOW HOY,

Appellants.

vs.

MARIE A. PROCTOR, Commissioner of Immigration and Naturalization, Seattle, Washington,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANTS

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Seattle, Washington.

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I

STATEMENT OF THE CASE

The appellants, Lee Bow Sing and Lee Bow Hoy, applied for admission to the United States at the Port of Seattle, Washington, and such admission was denied

by a Board of Special Inquiry, Bureau of Immigration, Department of Labor, an appeal was prosecuted by the appellants to the Board of Review, same department, and the appeal was dismissed. A petition for Writ of Habeas Corpus was filed in the United States District Court, Western District of Washington, Northern Division, and a show cause order issued thereon directing the said Marie A. Proctor, United States Commissioner of Immigration, Port of Seattle, to show cause why the said Lee Bow Sing and Lee Bow Hoy should not be admitted to the United States.

After argument by counsel and the submission of briefs, the court caused a minute entry to be made and entered an order and judgment denying the writ of habeas corpus. From the order and judgment so entered this appeal is prosecuted.

II

STATEMENT OF FACTS

The applicants, Lee Bow Sing and Lee Bow Hoy, sons of Lee Leng Tue, a native born United States citizen, arrived at the Port of Seattle, Washington, on the Steamship President Jefferson, June 25, 1935. They appeared before a Board of Special Inquiry of the Bureau of Immigration, Department of Labor, and on July 17, 1935, were denied admission to the United States. An appeal was taken from this finding to the Board of Review

on Appeals in said Department, and said appeal was dismissed on September 7, 1935. On September 20, 1935, the applicants were ordered deported, and on September 27, 1935, a petition for a Writ of Habeas Corpus was filed in the court below and a show cause order issued thereon, requiring the Commissioner of Immigration at Seattle to show why a Writ of Habeas Corpus should not issue.

III

Assignments of Error

The court erred in holding and deciding that a Writ of Habeas Corpus should be denied to the petitioners herein, denying them admission to the United States, as citizens thereof, sons of Lee Ling Tue, an American born Chinese.

IV

FINDINGS OF THE BOARDS

Admission to the United States was denied the applicants by the Board of Special Inquiry for the reason that the relationship claimed by them to their alleged father was not satisfactorily established by the testimony, evidence and records introduced in their behalf "nor has the claimed United States citizenship of Lee Leng Tue, your alleged father, ever been proved; also for the reason that you are aliens not in possession of an unexpired Immigration Visa and for the further reason that you

both are aliens ineligible to citizenship coming to the United States in violation of Section 13 (c) of the Immigration Act of 1924."

The Board of Review on appeal over-ruled the above finding of the Board of Special Inquiry in that the citizenship of the father was conceded; otherwise the said Board of Appeal sustained the Board of Special Inquiry and dismissed the appeal, because "the claim of these applicants has no other support than the testimony of the alleged father who is discredited by his previous record statements, the serious age discrepancy in the case of the older applicant and the presence in the testimony of such discrepancies as that concerning the applicant's maternal alleged grandmother." (Finding of Board of Review, Page 4.)

V

QUESTION PRESENTED

Were the hearings before the Board of Special Inquiry unfair, and the findings of that Board and the Board of Review on Appeal arbitrary and unlawful?

VI

ARGUMENT

The hearings before the Board of Special Inquiry were unfair, and the findings of that Board and the Board of Review on Appeal were arbitrary and are unlawful,

because there is no legal evidence in the record to sustain them.

It is submitted that the denial of the appeal of these applicants from the findings denying them admission to the United States as the sons of a native born citizen under the circumstances is an abuse of discretion and an arbitrary act which this court should correct.

This statement is based on the fact that there is no legal evidence in this record which disproves the testimony of the two applicants which is conceded by the department "to be in entire agreement" (Board Record, p. 28) one with the other.

The Department carefully sets out that the father, Lee Leng Tue, is a discredited witness, and in the next breath cites his testimony in support of its findings, but refuses to accept it insofar as it sustains the fact that these applicants are his sons. If the testimony of the father is accepted as sustaining a point against them, in justice and fairness it should be accepted to sustain a point in their favor.

The Board of Review on Appeal after finding that the father "Lee Leng Tue is a discredited witness," devotes pages to his testimony and picks out one statement which it accepts as true possibly because in the mind of the Board it sustains its conclusion.

Let us examine, for a moment, the part record as made by the father. On July 20, 1924, the father stated upon arriving in the United States that he had one son, Lee Sing, the older of the two applicants, now before the court, who was then in his first year, and in the affidavit of November 15, 1928, the father stated that he had one son born in 1924. It cannot be seriously contended that these statements were made by the father of this boy with any ulterior motive. It is a straightforward statement of the fact which the Board of Special Inquiry endeavors to prove wrong by inference and unfounded conclusions.

We wish to point out to the court that these are not statements made in the recent so-called hearings before the Board of Special Inquiry after arrival of these two boys in America. They are not part of the testimony in the instant case, of the father, whom the Department has discredited, but they are statements made many years ago and are contained in affidavits which appear as exhibits in the record. These statements were made in good faith, and having been made so many years ago, they were made undoubtedly without thought of their future use in this connection.

If there is really any serious doubt as to this boy's paternity it will be immediately dispelled by an examination and comparison of the photographs of him and his father, which are attached to various exhibits in connec-

tion with this case. There are two of his pictures on the affidavit dated May 25, 1935. There are two on the affidavit dated February 20, 1935, in which the applicant has on the same necktie as is shown in the full length picture of him, which is also an exhibit in the record.

Then go back to the affidavit of May 9, 1898 (Dept. file 7030/7691) and even in that crude picture the resemblance is striking. From that come on down to the affidavit of April 6, 1922, and then to the affidavit of December 7, 1928, and examine the photograph of the father attached thereto and compare them with those of the boy. All of these affidavits and photographs are a part of this record, and the conclusion after examination of them is irresistable that the man in this picture and this boy, Lee Bow Sing, are father and son. The government admits that the father is a native of the United States, consequently the son must be admitted.

But the Government contended below that the pictures are not evidence of relationship. This is true to a limited extent. If we had just one picture of each of the parties and tried to base relationship upon them, we might not have a basis for such a claim, but here we have a series of pictures and the resemblance between these two individuals is striking in all of them. In such a situation it is submitted that the pictures are competent evidence, and while not perhaps conclusive, they are very persuasive.

The use of pictures for the establishment of relationship in cases of this kind is not new. They were accepted in the case of *Chin Quong Mew, etc. vs. Tillinghast, Commissioner of Immigration,* 30 F. (2) 684; they were used in the case of *Wong Som Yin vs. Nagle,* 37 F. (2) 893, in which this court said in part:

> "Resemblance between such Chinese and alleged father is competent evidence, but not conclusive as to whether Chinese is foreign born son of an American born citizen."

Why even the Government used pictures to establish its case before this court in *Ex Parte Shiginari Mayemura,* 53 Fed. (2d) 621.

The two applicants after having been admonished to tell the truth, testified through a sworn interpreter, and their statements concededly are in entire agreement. The older of the applicants testified as to the place and date of his birth and that the younger applicant was his brother. This was sufficient to sustain an order of admission if no other objection was made, under the ruling of this court in *U. S. vs. Wong Gong,* 70 Fed. (2) 107, in which the court said in part:

> "The testimony of this witness as to the date and place of his birth is, of course, hearsay, but it is competent. Wigmore on Evidence, S. 1501; U. S. vs. Todd, (C. C. A.) 296 F. 345. In the case at bar appellee testified before the District Court in trial de novo and the testimony given by appellee before the

> Commissioner and before the Immigration Inspectors as to where he had lived since his birth, was also introduced. The District Judge accepted this testimony, which, if believed, is sufficient to sustain the order."

It is submitted that a fair consideration of the facts demands that these appellants be admitted to the United States.

The age of Lee Bow Sing, the older of the two appellants, is attacked with much vigor by the Department. It is submitted that his age is established by his testimony and documentary evidence appearing as exhibits in this case. This evidence consists of an affidavit made by the father on November 15, 1928, that this boy was born in 1924. There is also an affidavit which is an exhibit in this record made by the father as far back as July 20, 1924, in which he swore that he had one son named Lee Bow Sing in his first year of age.

The Board of Special Inquiry had X-ray photographs made of Lee Bow Sing to establish his age. The Board record recites (p. 25) that on July 6th the Medical Examiner of Aliens expressed his opinion in writing in regard to the age of the applicant; the Chairman of the Board of Special Inquiry guessed the applicant was between fifteen and seventeen years of age, not less than fifteen. Another of the Board members guessed he was at least sixteen, and the other Board member guessed he is sixteen or seventeen. Then Dr. Seth, United States

Public Health Service, guessed he is "not less than fifteen and probably not more than seventeen or eighteen years."

The calculation of the age of human beings by observation or mathematical formula has not been developed to such a degree of accuracy that it is entirely reliable as in the case of horses. In this regard in speaking of the determining of the age of men and women by X-ray, Dr. Maurice M. Pomranz, Chief of the X-ray Department of New York Hospital for Joint Diseases, a leading authority on the question of physical stigmata, said in the case of Chin Ging Thing, File No. 55813/223:

> "Epiphyseal development is not a mathematical certainty, and the interpretation or determination of age from the roentgenograms has limited applicability. Medical service is not so exact that one can state unequivocally that an applicant's age corresponds to a mathematically found formula, particularly where authorities themselves differ within twenty to thirty per cent of the estimates given. If age determination is a scientific certainty then it must not be subject to variations or exceptions or else inaccuracies creep in. Either age determination is an accurate thing or it is not. If it is not, then no conclusions are warranted that utilize questionable scientific data as a yard stick by which to settle their problem. From the brief examination given it is safe to assume that physical development is a variable process: too variable to be reduced to a single mathematical formula. To attempt to determine a child's age within the limits of two or three years and use the X-ray as uncontrovertible evidence is as unjust as it is unwarranted from the facts given."

There is a letter in the record which reads as follows:

"DR. E. B. SCHROCK,

Seattle, Wash.

July 29, 1935.

Commissioner of Immigration, Seattle.

Dear Sir:

Examination of Lee Bow Sing, held at the Seattle Station, because of a question of his age, shows on X-ray examination, normal ossification for twelve years, with epiphyseal lines for that age well marked.

"Have had four different joints rayed and all indicate the same age.

"Will be glad to submit plates if you wish.

Respectfully yours,

(Signed) E. B. SCHROCK, M. D."

The Board of Special Inquiry did not mention this letter in its report to the Appeal Board. However, the Board of Review refers to it (p. 3), but it does not fit the finding which the Board had determined upon, so the letter was thrown out.

This illustrates the point made by Dr. Pomranz, supra. Here are two physicians estimating the age of the same individual from observations and X-ray photograph. One says he is not less than fifteen years of age, and the other says that the X-ray shows that he is about twelve years of age, and on this record we say that he is about twelve years of age, and our guess ought be as good

as any other layman's.

It is submitted that the only competent evidence in the record shows that he is of the age claimed. Dr. Seth, of the U. S. Public Health Service, appeared before the Board of Special Inquiry as above set out, and made the statement that in his opinion the boy was at least fifteen years of age, but the Doctor was not sworn as a witness. The age claim is supported by the statement of the applicant himself and by the statements of the father and the affidavits previously filed by him.

In the case of *Papa vs. Day,* 45 F. (2d) 435, the court said in part:

> "Medical evidence on exclusion of an alien should be by affidavit setting forth qualifications of the witnesses and reasons for the opinion, and not by medical certificate merely."

The testimony of the doctor in the instant case was based largely upon a letter which some other physician had prepared. It was not even a certificate.

The record of the hearings before the Board of Special Inquiry, together with the exhibits and the opinion of the Board of Review on Appeal is before the court. This record shows that the hearings started July 1, 1935, and the On Jeong Poy, interpreter, *was* sworn (p. 11). Chin Ham Ku replaced On Jeong Poy as interpreter and *was not sworn* (p. 8). On July 2, 1935, Jick Chan ap-

peared as interpreter and *was not* sworn. Lee Leng Tue, father of the applicants, appeared as a witness and *was* sworn, and Dr. R. E. Seth acting surgeon United States Public Health Service, appeared as a witness and *was not sworn* (p. 25). Why were some of these parties sworn and others not sworn. Here is an arbitrary exercise of power which *might* very readily adversely affect the rights of these applicants, and constitute the hearing unfair. Now what constitutes an unfair hearing. In the case of *U. S. ex rel Shun vs. Van De Mook,* 3 Fed. Sup. 101, the Circuit Court of Appeals said in part:

> "Hearing in deportation proceedings is 'unfair' when practice complained of *might* have led to denial of justice." (Italics ours.)

And in *Bilokumsky vs. Todd,* 263 U. S. 149, at page 157, the Supreme Court said:

> "To render a hearing unfair the defect, or practice complained of, must have been such as *might* have led to a denial of justice, or there must have been absent one of the elements claimed essential to due process." (Italics ours.)

The attention of the court is invited to the language of the Supreme Court in this case, and of the Circuit Court in the preceding case, to the effect that any practice which *might* lead to a denial of justice constitutes unfair hearing.

In this connection it is submitted that the practice of

hearing testimony of a witness through an unsworn interpreter *might* lead to a miscarriage of justice, and especially as is true in the instant case where it is *not shown* that the *interpreters* were *official interpreters,* or anyone connected with the Department holding the Investigation.

The discrepancies dwelt upon by the Board of Special Inquiry were to a large extent discounted and passed over by the Board of Review with the statement:

> "It is not deemed necessary to repeat the numerous other disagreements which have been detailed by the chairman of the Board of Special Inquiry, some of which might at least in the case of the younger of the two applicants be reasonably attributed to his immaturity." (Board record, p. 4.)

There were some, however, which were taken into consideration and which may be explained largely by the fact that the parties testifying were honestly mistaken as to dates.

In the case of *Ex Parte Ikeda,* 68 F. (2) 276, this court speaking through Judge Wilbur said in part:

> "Honest witnesses are apt to be mistaken in dates, and dishonest have very little to fear from deliberate falsehood as to dates because of that fact."

At page 4, last paragraph of the finding of the Board of Appeal on Review, the Board states:

> "The claim of these applicants has no other support than the testimony of the alleged father *who is*

> *discredited* by his previous record statements * * * and the presence in the testimony of such discrepancies as that concerning the applicant's paternal grandmother * * *." (Italics ours.)

What is the testimony concerning this grandmother? The two applicants say they have never seen her; the father, the discredited witness, says they have seen her; that they lived in the same house with her and attended her funeral after her death. The record (p. 16) shows that the grandmother "died CR 22-5-10 at 31 Dok Wo Nam Street, in my house; that date is by the new calendar (May 10, 1923)." May 10, 1923, is before either of the applicants were born but says the Board of Review, the Inspector or the stenographer made a mistake in transcribing the date in parenthesis. How do we know that the mistake was not made when the dates "CR 22-5-10" was recorded, but, says the Board, other statements of the father concerning this date show that "CR 22-5-10" is correct, but it is pointed out the father is a discredited witness.

In the case of *Wong Bing Pon vs. Carr,* 41 F (2) 604, this court held that because a child in a deportation proceeding is of Chinese birth cannot raise the presumption that he knows the names of deceased grandparents.

Furthermore, in regard to discrepancies in the record, the court speaking through Judge Rudkin, in the case of *Go Lun vs. Nagle,* 22 F. (2) 246, said in part:

"On examination of petitioner (applicant) * * * for entry as the son of a citizen, and of his father and older brother, each was asked a given number of questions, material and immaterial, as to dates, events, and description of places. On all questions relevant to the claim of citizenship the witnesses agreed, but there was some discrepancy in their recollection of minor and unimportant matters, and on that ground petitioner was excluded. Held, that the hearing was manifestly unfair and the finding against citizenship unwarranted by the evidence.

"The purpose of hearing on application for entry as citizen is to inquire into citizenship, and not to develop discrepancies which may support an order of exclusion."

See also

Nagle vs. Dong Ming, 26 F. (2) 438;
Hom Ching vs. Nagle, 41 F. (2) 126;
Louie Poy Hok vs. Nagle, 48 F. (2) 252.

The attention of this court is respectfully invited to the fact that the Board of Special Inquiry dwelt at great lengths on the proposition that the father of the applicant was not entitled to United States citizenship (Board Record, pages 27 and 28), and that the denial of admission to the appellants was based partially on that ground (Board Record, p. 26). It is submitted that with the Board in such a frame of mind a fair hearing could not be and was not given the appellants.

The decision of the Court below is based upon authority of

Mishimura Ekin vs. U. S. 142 U. S. 651;
In *Re Way Tai,* 96 Fed. 494;
Ex Parte Gouthro, 296 Fed. 506;
Lee Sun vs. U. S., 218 Fed. 432;
Jeung Bow vs. U. S., 228 Fed. 868;
Ng Mon Tong vs. Weedin, 43 F. (2) 178.

All of these cases except the last one, which deals with the competency of a doctor's certificate as evidence of age, involve either the Immigration Act of March 3, 1891, or that act as amended by the Act of August 18, 1894. Neither of these acts create or authorize the appointment of a Special Board of Inquiry. The Act of February 5, 1917, creates the Special Board of Inquiry and provides for the appointment of members thereof at various ports of entry.

Under the prior acts Inspectors, one or more, examined incoming aliens and it was not necessary that any record be kept of the proceeding. Under the last mentioned Act the Board of Special Inquiry is required to make a written record of all proceedings before it and forward it with its report. The result is that the testimony of witnesses is taken under oath in question and answer form as in a judicial proceeding.

In the case of *Ng Mon Tong vs. Weedin, supra,* (43 F. (2) 718), the witness, Dr. A. R. Bailey, made the certificate and examination. In the instant case no certifi-

cate was made and the individual who made the X-ray examination did not testify. The statement of Dr. Seth, who was *not* sworn as a witness, was based partially upon the statements of the X-ray examiner (Board record, p. 25). The failure of the Board of Special Inquiry to properly procure and receive this scientific evidence constitutes an unfair hearing under the opinion of this court in the case of *Wong Bing Pon vs. Carr,* 41 F. (2) 604, where the court holds that where a difference of opinion as to age of Chinese applicant for citizenship is sole substantial ground for rejection, failure of the Immigration officials to procure scientific assistance in effect constitutes an unfair hearing. The privileges of citizenship are not to be lightly denied an applicant for admission.

Conceding for the sake of argument, but specifically denying, that Lee Bow Sing is of the age of 15 to 17 years and therefore not the son of Lee Lung Tue, a native born United States citizen, how does that affect Lee Bow Hoy, the other applicant. We believe that on the record Lee Bow Hoy is entitled to admission because his birth date is established, his paternity is established, and his testimony is consistent and unimpeached. The discrepancies cited by the Board in its determined effort to exclude him because it thought his father had been improperly admitted 37 years ago, are of no consequence, being such as appear in the testimony of witnesses in any

trial or hearing.

It is submitted that even though Lee Bow Sing is denied admission, the hearing as to Lee Bow Hoy was unfair and the finding of the Board arbitrary and capricious, there being no evidence to support a decision excluding him.

> "The decision must be after a hearing in good faith, however summary, Chin You vs. U. S., 208 U. S. 12, *and it must find adequate support in the evidence.* Zakonaite vs. Wolf, 226 U. S. 272, 274." (Italics ours.)
>
> *Kwock Jan Fat vs. White,* 253 U. S. 454:
>
> "A finding without evidence is arbitrary and useless and an Act of Congress granting authority to *any* body to make a finding without evidence would be inconsistent with justice and the exercise of arbitrary power condemned by the Constitution. (Italics ours.)
>
> *Interstate Commerce Com. vs. L. & N. Railway Co.,* 227 U. S. 88.

We realize, of course, that a Board of Special Inquiry is not bound by the strict rules of evidence as are the courts, but such a Board is bound by rules of reason and logic. *Lee Wing You vs. Tillinghast,* 27 Fed. (2) 580.

VII

CONCLUSION

In conclusion, it is respectfully submitted that the Board record contains nothing which justifies the order of the lower court denying the writ of Habeas Corpus and

discharge of the appellants. On the other hand, the statements of the two applicants are unimpeached and are concededly in entire agreement; one corroborates the other.

Under the decision of this court above referred to, the evidence is sufficient to sustain an order for the relief prayed, but aside from these statements, there are in the record the statements made by the father in the years 1924 and 1928, together with the photographs of the father over a period beginning in the year 1898, and culminating in 1935.

Taken all in all, it is submitted that the record in this case indicates most clearly an unfair hearing and an arbitrary finding by the Board.

As a matter of fact, a close perusal of the record and the comments of the Board at the conclusion thereof will reveal that the real reason why these applicants were denied admission was because the Board of Special Inquiry felt that when their father was admitted to the United States as a native born citizen, it was on inadequate evidence. The Board of Appeal in the Department of Labor reversed the local board on this point, but we feel that because of this attitude of the local board that these applicants could not have a fair and impartial hearing before that body.

With reference to the discrepancies in the record, the court's attention is again most respectfully invited to the case of *Go Lun vs. Nagle,* 22 Fed. (2) 246 in which this court speaking through Judge Rudkin dealt with a case parallel to the instant case and goes into the matter of discrepancies very thoroughly.

It is further pointed out that most of the discrepancies referred to by the Board are those which might be expected in the testimony of youngsters of the ages of these applicants.

Remembering that these boys are but 12 and 6 years of age, and are inexperienced and were examined only by members of the Board, and only answered such questions as were asked, volunteering no statement, let us ask what judge or lawyer of any experience has not seen a witness examined by one side make an apparently impregnable case and then just one or two skillful questions by the opposite counsel and the case falls like a house of cards.

In cogitating this record, we believe that the ages of these applicants should be taken into consideration in determining their eligibility for admission. It cannot be expected that individuals of their ages would give the kind of testimony that would be given by an individual of mature years. It is further submitted that because of the ages of these applicants it is possible for an examiner of experience to put the answers in the mouth of the witness,

without the witness realizing it. This record shows on the part of these two boys a straight-forward story. They recite facts as they remember them, and in accord with the development of the power of observation of humans of their ages.

It is submitted that the hearings before the Board of Special Inquiry were unfair and unjust, and the denying of admission to these boys was an arbitrary act. That there is no legal evidence in this record upon which these applicants could legally be denied admission to the United States. That the evidence adduced does not support the findings of the Board of Special Inquiry. That the Findings of the Board of Special Inquiry and the Board of Review on appeal abuse the discretionary powers of these boards and that the order of the court below is unfounded and should be reversed.

In the alternative, it is suggested that should this court agree with the findings of said Boards and the lower court as to Lee Bow Sing, the older boy, it is submitted that the order of the lower court should be reversed as to Lee Bow Hoy, the younger boy, for the reason heretofore set forth.

It is therefore respectfully submitted,

1. That the order of the lower court denying the writ of habeas corpus should be reversed and the appel-

lants discharge ordered.

In the alternative,

2. That if the order of the lower court is affirmed as to Lee Bow Sing, the older boy, it should be reversed as to Lee Bow Hoy, the younger boy and his discharge ordered.

Respectfully submitted,

.....

JOHN ROWE WHEELER.

SULLIVAN & WHEELER,
Of Counsel.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 8097

LEE BOW SING and LEE BOW HOY,

Appellants,

—vs.—

MARIE A. PROCTOR, United States Commissioner of Immigration and Naturalization at the Port of Seattle, Washington,

Appellee.

Upon Appeal from the District Court of the United States
For the Western District of Washington,
Northern Division.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF PRINTING CO.

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STATUTES CITED

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The appellants, Lee Bow Sing and Lee Bow Hoy, are of the Chinese race and were born in China. They arrived from China at Seattle on June 25, 1935, and applied for admission into the United States as citizens thereof by virtue of being foreign born sons of a native citizen of the United States named Lee Leng

Tue, who accompanied them to this country. Following the usual hearings before a legally constituted Board of Special Inquiry at the Seattle Immigration Station they were denied admission for the reason they failed to establish their claim of relationship to their alleged father, from which decision they appealed to the Secretary of Labor, Washington, D. C., who dismissed the appeal and directed that they be returned to China. Thereafter they filed a petition for a Writ of *Habeas Corpus* in the United States District Court for the Western District of Washington, Northern Division. The case now comes before this Court on appeal from the judgment of the District Court denying the said petition.

LAW AND AUTHORITIES

Section 23 of the Immigration Act of 1924 (8 USCA 221) places the burden of proof upon applicants for admission into the United States, as do the Chinese Exclusion Laws, *White v. Chan Wy Sheung*, 270 Fed 764 CCA9; *Christy v. Leong Don*, 5 Fed. (2) 135 CCA5, *writ of certiorari* denied 269 US 560.

Section 17 of the Immigration Act of February 5, 1917 (8 USCA 153) provides that Boards of Special Inquiry shall have authority to determine whether ap-

plicants for admission shall be allowed to land or shall be deported and that

> " * * * In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor: * * *."

In *Quon Quon Poy v. Johnson*, 273 US 352, the Supreme Court said:

> "and that unless it appears that the Department officers to whom Congress had entrusted the decision of his claim, had denied him an opportunity to establish his citizenship, at a fair hearing, or acted in some unlawful or improper way or abused their discretion, their finding upon the question of citizenship was conclusive and not subject to review, and it was the duty of the court to dismiss the *writ of habeas corpus* without proceeding further."

And for other similar authorities, see *Chin Ching v. Nagle*, 51 Fed (2) 64 CCA9.

In *Yep Suey Ning v. Berkshire*, 73 Fed. (2) P751, this Court held that

> "It must be borne in mind that this court must not substitute its judgment for that of the immigration boards on matters of fact."

In *Woo Suey Hong v. Tillinghast*, 69 Fed (2) 94, CCA1, the Court said:

> "It is not sufficient that this court upon the evi-

dence might have come to a contrary conclusion. Each board is the judge of the weight to be given to the evidence."

The Immigration officers are exclusive judges of weight of testimony and credibility of witnesses appearing before them.

Jew Hong Sing v. Tillinghast, 35 Fed (2) 559 CCA1,

Masamichi Ikeda v. Burnett, 68 Fed (2) 276 CCA9,

Mastoras v. McCandless, 61 Fed (2) 366 CCA3,

Ngai Kwan Ying v. Nagle, 62 Fed (2) 166 CCA9.

"In reviewing the case, we must bear in mind the well-settled rule in cases of this character, namely, if there is a possibility of disagreement among reasonable men as to the probative effect of the discrepancies or contradictions in the testimony of the witnesses, the finding of the administrative board will not be disturbed."

Haff v. Der Yam Min, 68 Fed. (2) 626 CCA9.

ARGUMENT

It is conceded that Lee Leng Tue, the alleged father of the appellants is a citizen of the United States. The sole issue is the question of whether the appellants are in fact sons of Lee Leng Tue. The burden of proof is on them to prove their claim of relationship. The Immigration officers are not required to disprove their assertions. In cases of this character it has for many

years been the established practice of the Immigration officials to question the applicants for admission on matters pertaining to their personal and family history, their place of residence, neighbors and events with which they could be expected to be familiar. If their testimony is in substantial agreement on material points it is presumed that the relationship claimed has been proved. If, on the other hand, the applicant and witnesses disagree as to important matters which they should or would know if the claimed relationship exists, there is a strong probability that the claim of relationship is false. This method of testing the veracity of the applicants and witnesses has long been upheld by the courts. *Ex parte Jew You On*, 16 Fed (2) 153; *Siu Say v. Nagle*, 295 Fed 676 CCA9; *Yep Suey Ning v. Berkshire*, 73 Fed (2) 745 CCA9.

The findings on appeal by the Board of Review at Washington approved by the Assistant to the Secretary of Labor cover only a few of the discrepancies raised by the Board of Special Inquiry at Seattle and are set forth on the blue sheets, number 1 to 6, contained in the certified record of the case, some of which will be here discussed:

The finding beginning with the last paragraph on page 1 reads:

"In 1922 when an applicant for a citizen's return

certificate at New York, Lee Leng Tue after being sworn was asked whether had any other name than Lee Leng Tue and answered, "No." He was then asked, "Were you ever married?" and answered "Yes, but my wife died last year." Asked the name of his wife he answered "Chen She; I have one boy and one girl—Lee Way, about 20; one daughter, Lee Shew, 13." Then being asked "What is your marriage name?" answered Lee Tue Sing." Later in the same hearing he was asked "If you returned to the U. S. in 1898 and have not been out of the U. S. since that time, how can you be the father of two children, one about 20 years of age and one 13 years of age, who have always lived in China?" to which the record indicates that he made no answer. Also in the same hearing Lee Leng Tue was asked, "Did your father have any brothers in the United States?" and answered, "Yes, one older brother, Lee Gee Toy; he died in China about 20 years ago." On his return, July 20, 1924, at the same time that Lee Leng Tue was recorded as claiming a son of the name given by and for the older of the present applicants when asked to give the names of wives living or dead, was recorded as answering, "Low She—dead" before giving the name which corresponds with that of the present applicants' alleged mother. In answer to the question, "How many children have you ever had?" Lee Leng Tue was recorded as answering, "One." The name given for Lee Leng Tue's wife and the mother of these applicants is Ng Shee. The present examination shows the following testimony on the part of Lee Leng Tue:

"Q. Did you ever have any other wife than Ng Shee?

A. No.

Q. Did you ever have a wife by the name of Low Shee?

A. No.

Q. Can you explain why you testified at New York April 6, 1922, that your wife died last year (CR10)?

A. Yes, my first wife died little over 20 years ago.

Q. What was her name?

A. Low Shee.

Q. Were any children born to Low Shee by you?

A. No.

Q. Did you ever know a person by the name of Lee Way or a girl by the name of Lee Shew?

A. No.

Q. Did you ever have a wife by the name of Chen She?

A. No.

Q. Can you explain why you testified at New York April 6, 1922, that your deceased wife's name was Chen She?

A. Yes, I had a wife Chen She.

Q. How many wives have you actually had?

A. Two. That was a mistake about Low Shee I didn't remember my first wife's name.

Q. Can you explain why you testified at New York April 6, 1922, that you had a son

Lee Way about 20 and a daughter Lee Shew about 13?

A. I did not make such a statement; I haven't any children by those names.

Lee Leng Tue also has now said that his father never had a brother."

Where a witness previously described the members of his family and described them vastly differently when bringing a child to this country, such discrepancies are of sufficient importance to justify the rejection of his testimony.

Moy Chee Chong v. Weedin, 28 Fed (2) 263 CCA9,

Fong Lung Sing v. Day, 37 Fed (2) 36 CCA2,

Chin Lim v. Nagle, 38 Fed (2) 474 CCA9,

Soy Sing v. Chinese Inspector, 47 Fed (2) 181 CCA2,

Wong Shong Been v. Proctor, 79 Fed (2) 881 CCA9.

Finding beginning with last paragraph on page 2 reads:

"According to the birthdates February 11, 1924, and March 4, 1924, both of which have been given by the alleged father for the older of these applicants, he was less than 11½ years old at the time of his examination. The members of the examining board judged him to be not less than fifteen years of age and the medical examiner at Seattle stated in writing that he was of the opinion regarding the applicant that "due to his facial ex-

pression, teeth, sexual development, and general characteristics, he is between the ages of 15 and 17 years. This is also borne out by X-ray photographs taken by Dr. Curtis Thomson, X-ray Consultant, Seattle Marine Hospital, whose opinion is that the alien is 'not less than 15 and probably not more than 17 or 18 years'." The medical officer supplemented this written statement in his appearance before the Board stating that, "In my opinion he is between the ages of 15 and 17 years. This opinion is based on his facial expression which is that of a youth in his late teens, his teeth, which are all erupted except the third molars, his sexual development and general characteristics which are both those of a fairly mature youth. The permanent teeth are fully erupted at approximately 15 years of age with the exception of the 3rd molars and in this alien they show evidence of having been erupted for at least several years." Opportunity was afforded for the examination of the applicant by a private physician and the record contains a statement of such a physician that, "Examination of Lee Bow Shing, held at the Seattle station, because of a question of his age, shows on X-ray examination, normal ossification for twelve years, with epiphyseal lines for that age well marked." In view of the detailed statement presented by the medical officer and X-ray Consultant, as well as the photographic indication that the applicant is considerably beyond eleven years of age, it is not believed that this statement of the private physician offsets the evidence that the older of these two applicants is actually of an age which makes his claimed relationship to the alleged father impossible."

The asserted age of appellant Lee Bow Sing is seriously disputed by the Immigration officials. Two dates for his birth are given, February 11, 1924, and

March 4, 1924. If either of the said dates are correct, Lee Bow Sing was not more than 11 years and 5 months of age at time of his examination before the Board of Special Inquiry. His age must fit his alleged father's essential trip to China. It is shown that the alleged father arrived from China on May 7, 1898, and remained continuously in the United States until 1922. He was issued a return certificate by the New York Immigration office in April, 1922, and departed via Vancouver, Canada, for China during July 1922. The three members of the Board of Special Inquiry, after observing and hearing Lee Bow Sing testify, set forth their opinions in the record to the effect that he was at least 16 years, 16 or 17 years, and between 15 and 17 but not less than 15 years of age, respectively. Certain bones and joints of Lee Bow Sing were X-rayed by Dr. Curtis Thompson, X-ray consultant for the United States Marine Hospital at Seattle. After a physical examination was made of Lee Bow Sing and with the aid of X-ray pictures Dr. Seth of the United States Public Health Service, who is attached to the Immigration Station as medical examiner of aliens, filed a letter equivalent to a certificate, appeared before the Board of Special Inquiry, and stated that Lee Bow Sing was between 15 and 17 years of age.

Full opportunity was given Lee Bow Sing to be

examined by outside physicians of his own choice, and thereafter was examined by Dr. E. B. Schrock of Seattle, who submitted a letter to the effect that the appellant was 12 years of age. Dr. Schrock did not testify before the Board of Special Inquiry, and consequently the Board was deprived of the opportunity of inquiring into his qualifications, experience, in determining ages and possible bias. His opinion is based entirely on X-ray pictures made under his direction, which were not submitted in evidence. He made no comment on the appellant's physical development. His letter was not prepared under any oath of office. The result of his actions in behalf of the appellant does not meet the "best evidence" rule. Dr. Schrock's opinion falls far short of being sufficient to overthrow the opinions of the Board members and of Dr. Seth, all of whom were under oath from date of their employment by the United States to faithfully perform their duties and who are experienced in estimating the ages of applicants appearing before them.

The appellant's contention that the Board of Special Inquiry at Seattle did not consider Dr. Schrock's letter is conceded, but their allegation that the said letter was thrown out by the Board of Review at Washington is, to say the least, inconsistent with the facts. It is shown that the Board of Special Inquiry record

with all Exhibits was on July 25, 1935, forwarded on appeal to the Secretary of Labor. The letter of Dr. Schrock is dated July 29, 1935, and being received later could not have been considered by the Board of Special Inquiry at Seattle and no request was made for a reopening to permit of its consideration. However, at the request of the appellant the said letter was sent to th Secretary of Labor where it was duly considered by the Board of Review and made the subject of a finding.

Counsel for the appellants quote on page 10 of their brief an exparte statement purported to have been made by Dr. Maurice M. Pomranz as an authority on age determination through the use of X-rays. The quoted statement is not subject to verification here. It is not shown that Dr. Pomranz is an authority on the particular point here involved, or that he is of the same opinion now, or that he is the author of any text book used by the medical profession. It is apparent that Dr. Pomranz was employed to give his opinion in behalf of a Chinese applicant for admission named Chin Ging Thing whose appeal was pending before the Immigration Service. The opinions of the Board of Special Inquiry members and of Dr. Seth are based on well grounded facts and are not impeached in the slightest degree by the letter of Dr. Schrock or by the purported expression of Dr. Pomranz, and the "guess" of counsel

for the appellants is without merit.

Counsel for appellants advance the opinion of Dr. Pomranz who says that age cannot be determined by use of X-rays and on the other hand present the opinion of Dr. Schrock who says that he did determine the age of Lee Bow Sing through the use of X-rays. They present a negative and an affirmative on the same point. One nullifies the other, and therefore both should be stricken from consideration. Also, they accept in good grace the opinion expressed in the letter of Dr. Schrock, but reject the opinion set forth in the letter of Dr. Seth.

We submit that Dr. Seth is a medical officer, regularly appointed and serving under an oath of office, of the United States Public Health Service, and that he is attached to the United States Immigration station at Seattle, as is provided for by Sec. 16 of the Immigration Act of 1917 (8 USCA 152), and that he is not required to be sworn in each or any case requiring his official services. His letter and his statement before the Board of Special Inquiry are competent evidence as held in the United States *ex rel Fong On v. Day*, 54 Fed (2) 990 CCA2, which cites with approval various decisions of this Court, but rejects some of the reasoning in the case of *Wong Bing Pon v. Carr*, 41 Fed (2) 604 CCA9, cited by appellants.

There is a variance of at least 3 years and 7

months between the age claimed by Lee Bow Sing and the age set by the government officials.

In *Young Fat v. Nagle*, 3 Fed (2) 439 CCA9, the appellant claimed to be 8½ years of age. The government physician, several immigrant inspectors and the Board members held that the appellant was between 11 and 14 years while one believed he was about 9 years old. This Court cited *Wong Fook Ngoey v. Nagle*, 300 Fed 323 CCA9 and *Fong Lim v. Nagle*, 2 Fed (2) 971 CCA9, and said:

> "The several discrepancies in the estimates of the age of the boy are noticeable; but they are far from being such as to justify the conclusion that there was no substantial support for the opinion that the boy was well over 8½ years old. * * * the case being one of conflicting evidence, upon which members of the board have exercised their judment, it will not be disturbed by the courts."

And this logic is supported by *Ng Mon Tong v. Weedin*, 43 Fed (2) 718 CCA9 and *Fong On v. Day*. 54 Fed (2) 990 CCA2. Photograph of each appellant and X-ray pictures of Lee Bow Sing made at the expense of the government are made Exhibits.

Finding beginning with last paragraph on page 3 reads:

> "The alleged father testified that his mother, after living continuously with his family for thirteen years prior to her death, died "C. R. 22-5-10"

(May 10, 1933) in his house at 31 Dok Ho Num Street, which is claimed to have been the home of these applicants. He also stated that both of these applicants attended the funeral of their paternal grandmother. Both applicants testified that they had never seen either of their grandparents. The attorney conceding the seriousness of this discrepancy would seem to attempt to maintain that it is "of doubtful existence" the ground for this being that following the recording of the alleged father's statement in answer to the request to describe his mother "Chun Shee, released feet, she died CR 22-5-10, at No. 31 Dok Wo Nam Street, in my house; that date is by new calendar" an error was made either by the examining officer or by the stenographer in giving in parenthesis the American equivalent of the Chinese date "C. R. 22-5-10" so that it appears in the record as (May 10, 1923) instead of May 10, 1933. This date as erroneously given in the parenthesis is no part of the alleged father's testimony and his statement that these applicants attended the funeral of his mother plainly shows that he intended to say what the record shows that he did say that she died in the Chinese equivalent of the year 1933. Also, the alleged father has designated the sleeping place of his mother prior to her death in the household of which these applicants are claimed to have been members which he would not have done if he had intended to say that she died before either of them was born. Certainly the older of the applicants would have a clear memory and the younger of the applicants might be expected to have some memory of their grandmother if she had in fact, as the alleged father testifies, been a member of their household up to two years ago."

Amplifying the foregoing discrepancy, the alleged father testified that after being sick 4 or 5 days and

at the age of 80 years his mother died CR 22-5-10, corresponding to the American calendar of 1933, in the house in which he and the appellants were living; that both appellants attended the funeral with he and his wife, all going to the burial ground by automobile; that eight musicians rendered music at the funeral services and that he took both appellants to worship at his mother's grave during the early part of 1935. Lee Bow Sing says that he never saw either of his father's parents, that both died years ago; does not know their names and never worshipped at their graves. Lee Bow Hoy says that he never saw either of his father's parents; that he never learned whether they were living or dead; that he never worshipped at their graves and does not know where they are buried. If these appellants were living in the same house with their alleged father at the time of death of his mother they should have full knowledge of the death and circumstances connected with the funeral. It is believed this discrepancy is fatal to the appellants' claim of relationship.

Chin Shue Teung v. Tillinghast, 33 Fed (2) 122 CCA1,

Weedin v. Yip Kim Wing, 41 Fed (2) 665 CCA9,

Weedin v. Yee Wing Soon, 48 Fed (2) 36 CCA9.

Finding, 2nd paragraph page 4 reads:

"Both applicants describe the house in which they claim to have been living with their alleged father

as a two story building, stating that their quarters were on the second floor. They describe the bedroom in which the older of the applicants slept as being on the same floor with the bedroom in which the alleged father and his wife slept and they both testify that the ground floor of that building has been vacant and was vacant at the time that they left there to come to the United States. The alleged father described this building at one time as a three story structure and again as a building two and a half stories in height with the sleeping room occupied by the older of the two applicants on the top floor above the second story. The alleged father also stated that the ground floor of that building was occupied by the family of Lum Jok Yu whose members had been living there since the second month of this year. Certainly even children of the ages of these applicants might be expected to know that the apartment immediately below theirs was occupied particularly if as the alleged father's testimony indicates that occupation was a matter of recent occurrence."

The details concerning the aforementioned discrepancy are further explained. It will be noted that both appellants stated that there was no stream or body of water near their house. The alleged father testified that there is a river named Bak How Hon only one block from their house and which could be seen from the top of their house. Such a discrepancy furnishes reasonable proof that the appellants did not live in the house claimed.

Counsel for the appellants contend that the hearing before the Board of Special Inquiry is unfair for

the reason that Dr. Seth and Interpreters Chin Ham Kee and Jick Chan were not sworn, but concede that Dr. Seth is a member of the U. S. Public Health Service staff. They do not allege that any part of the testimony of the witnesses is other than as is shown in the record. Neither appellant was sworn owing to the fact they both claimed to be under 12 years of age and for the further reason they did not understand the nature of an American oath and such an oath would not be binding on their conscience.

Interpreters Chin Ham Kee and Jick Chan were regularly appointed official Chinese interpreters under authority of the Civil Service regulations and both have been continuously employed at the Seattle Immigration station for more than five years, their last oaths of office were subscribed to on November 27, 1933, copies of which were made Exhibits.

Interpreter Ong Jeong Poy was regularly employed as an official interpreter until August 19, 1933, when his services were discontinued on account of reduction of the force. However, he has been since frequently employed on a per diem basis without appointment, which will explain why it was necessary that he be sworn in the present case.

The three named interpreters served in the case of *Weedin v. Chin Guie*, 62 Fed (2) 351 CCA9, and

each are mentioned in the government's brief, No. 6931.

The record shows that the appellants were represented by Attorney Roger O'Donnell, Esq., on appeal before the Department at Washington. No request was made by said attorney that the case be reopened by the local Board of Special Inquiry and no exception was taken to the status of the interpreters or of Dr. Seth. In the absence of such a request being made, it may be presumed that there is no jurisdictional defect in the record. See *Fong On v. Day*, 54 Fed (2) 990 CCA2.

In *Fong Kong v. Nagle*, 57 Fed (2) 138 CCA9, the Court held that the Immigration authorities are entitled to receive and determine the questions before them upon any evidence that seems worthy of credit.

It was held in *Jeung Bow v. United States*, 228 Fed. 868-871 CCA2, that an official interpreter acting under oath of office is not required to be sworn in each case; if otherwise it would be like swearing a judge anew at each trial. *Lee Sim v. United States*, 218 Fed 432 CCA2 holds that an official interpreter need not be sworn.

In principle or in fact there is no difference between the official status of the interpreters herein mentioned and a member of a Board of Special Inquiry.

Each subscribe to the same oath of office. This Court has expressly ruled that Board members are not required to take an oath preliminary to each particular hearing. *Moy Chee Chong v. Weedin*, 28 Fed (2) 263 CCA9.

The law is that it will be presumed until the contrary is shown, that persons acting in a public office have been duly appointed and are acting with authority. *Keeley v. Sanders*, 99 US 441. No evidence was offered during the court proceedings to show that the actions of Dr. Seth or of the interpreters was not according to law.

The assertion of the attorneys for appellants that Boards of Special Inquiry were created by the Act of February 5, 1917, is not correct. Such Boards were created by Sec. 25 of the Immigration Act of March 3, 1903, and reenacted by the Act of February 20, 1907 and Act of February 5, 1917.

It is admitted that the statements of the two appellants is in practical agreement and it is possible they are brothers even if one is several years older than claimed. The material point is they do not agree with the testimony of their alleged father on various important details and events. If some part of the alleged father's testimony is believed it does not follow that the rest of his conflicting testimony must be ac-

mission against interest may be accepted as being true but an assertion in favor of a witness does not have to be believed.

It is common knowledge that all Chinese arriving in the United States and those applying for return certificates during the past twenty-five years are questioned each time concerning their marital status and description of their children. The Chinese know that they cannot bring to this country children whom they did not claim when given an opportunity to do so, consequently in many instances they lay the foundation and describe children that are fictitious in the hope of financial gain in the future. So many cases of this character have been before the courts that it is not thought necessary to cite any of them.

Whether there is any resemblance between the photographs of the appellants and their alleged father is immaterial. Resemblance does not prove relationship or off-set material discrepancies. See *Wong Hon Ping v. Haff*, 63 Fed (2) 448 CCA9; *Louie Lung Gooey v. Nagle*, 49 Fed (2) 1016 CCA9, and the deported case of *Wong Som Yin v. Nagle*, 37 Fed (2) 893 CCA9, cited by the appellants.

Counsel for appellants suggest that should the Court sustain the deportation order in case of Lee Bow

Sing, the older boy, that the order should be reversed as to Lee Bow Hoy, the younger boy. Both are governed by the same testimony, with exception of the question of age against the older boy. Under these circumstances a doubt as to one extends to the other. *Fong You Tun v. Nagle*, 293 Fed. 900 CCA9; *Hong Tong Kwong v. Nagle*, 299 Fed. 588 CCA9.

CONCLUSION

The appellants were accorded a fair hearing by the Immigration officials and failed to sustain the burden which was upon them to establish their claim of relationship to their alleged father. The evidence does not constitute convincing proof that either of the appellants is a son of the alleged father and is not of such a nature as to require, as a matter of law, a favorable finding in that respect. The discrepancies in the testimony constitute evidence upon which the Immigration officials could reasonably arrive at their excluding decision. The said officials did not abuse their discretion committed to them by the statutes, and their excluding decision is not arbitrary, capricious or in contravention of any rule of law, or in conflict with any principle of justice; hence, it is final. The District Court did not commit error in denying the *Writ of*

Habeas Corpus, and its judgment and order should be affirmed.

Respectfully submitted:

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F. A. PELLEGRINI,
Assistant United States Attorneys.

Attorneys for Appellee.

J. P. SANDERSON,

United States Immigration and Naturalization Service,

On the Brief.

No. 8105

United States

Circuit Court of Appeals

For the Ninth Circuit.

9

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

RICHARD S. McCREERY,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Co., 545 Sansome Street, San Francisco 60—4-7-36

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

JOHN C. ALTMAN, Esq.,

For Comm'r:

GEO. D. BRABSON, Esq.

Docket No. 73322

RICHARD S. McCREERY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES.

1933

Aug. 12—Petition received and filed. Taxpayer notified. (Fee paid)

" 12—Copy of petition served on General Counsel.

Sep. 22—Answer filed by General Counsel.

Oct. 2—Copy of answer served on taxpayer.

1934

Apr. 18—Hearing set week of July 2, 1934 at San Francisco, Calif.

Jul. 13—Hearing had before Mr. Morris on merits. Stipulation of facts filed. Briefs due Sept. 15, 1934.

" 24—Transcript of hearing 7/13/34 filed.

1934

Sep. 12—Brief and proposed findings of facts filed by taxpayer. 9/12/34 copy served.

" 14—Brief filed by General Counsel.

Oct. 22—Motion for leave to file reply brief, reply brief lodged, filed by taxpayer. 10/24/34 granted—10/26/34 copy served.

1935

Jun. 19—Memorandum opinion rendered, Mr. Logan Morris, Div. 14. Decision will be entered under Rule 50.

Jul. 1—Notice of final settlement filed by taxpayer.

" 2—Hearing set July 24, 1935 under Rule 50.

" 5—Copy of notice of settlement and notice of hearing served on General Counsel.

" 17—Notice of settlement filed by General Counsel.

" 27—Decision entered, Div. 14. Logan Morris.

Sep. 23—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by General Counsel.

Oct. 10—Proof of service filed.

" 29—Statement of evidence lodged.

Nov. 15—Motion for extension to file objections to statement of evidence and extension for hearing on statement filed by taxpayer. 11/16/35 granted and set for hearing 12/4/35.

" 16—Notice of lodgment of statement and of hearing on Nov. 18, 1935 or thereafter filed by General Counsel. Proof of service thereon.

1935

Nov. 16—Praecipe with proof of service thereon filed.

" 21—Motion for extension to Jan. 23, 1936 to complete and transmit record filed by General Counsel.

" 21—Order enlarging time to Jan. 23, 1936 to prepare evidence and deliver record sur petition for review entered. [1*]

" 26—Objections and amendments to statement of evidence lodged.

" 26—Notice of lodgment of objections and amendments to statement with hearing notice 12/2/35 filed.

Dec. 4—Hearing had before Mr. Logan Morris, Div. 14 on approval of statement of evidence.

" 9—Order that objections numbered 1, 2, 3, 5, 7, 6, 8, 9, 10, 11, 12, 13, 14 and 16 be sustained and that objections 4 and 15 be overruled and that statement of evidence be prepared in accordance herewith entered.

" 28—Statement of evidence approved and ordered filed. [2]

*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States Board of Tax Appeals

No. 73322

RICHARD S. McCREERY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:E-2-WPE-60D) dated June 29, 1933, and as the basis of his proceedings, alleges as follows:

I.

The petitioner is an individual, with his address and office at 155 Montgomery Street, San Francisco, California.

II.

The notice of deficiency (a copy of which is attached and marked Exhibit "A") was mailed to the taxpayer on June 29, 1933. The report of the Internal Revenue Agent in charge at San Francisco, California, dated [3] October 26, 1932, and transmitted to the taxpayer under date of November 17, 1932, was approved in said notice of deficiency and made a part thereof, and accordingly a copy of said report is attached and marked Exhibit "B".

III.

The amount of the deficiency determined by the commissioner is the sum of $7162.98, and represents additional individual income taxes of petitioner for the calendar year 1930; of said deficiency, the sum of approximately $5,000.00 is in controversy.

IV.

The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) In determining the taxable net income of the petitioner for the year 1930, respondent erroneously disallowed a loss sustained by petitioner in that year in the sum of $12,783.47, arising out of the sale by petitioner of 957 shares of the capital stock of Standard Oil Company of California. In this behalf, petitioner sets forth that of said loss in the sum of $12,783.47, $7914.47 represented a "capital loss", within the purview of Section 101 of the Revenue Act of 1928, and $4869.00 thereof represented an ordinary loss, deductible from gross income of petitioner.

(b) In determining the taxable net income of petitioner for the year 1930, respondent erroneously disallowed a loss sustained by petitioner in that year [4] in the sum of $22,263.40 arising out of the sale by petitioner of 661 shares of the capital stock of Transamerica Corporation. In this behalf, petitioner sets forth that of said loss in the sum of $22,263.40, $18,638.00 represented a "capital loss", within the purview of Section 101 of the Revenue

Act of 1928, and $3625.40 thereof represented an ordinary loss deductible from gross income of petitioner.

(c) In determining the taxable net income of petitioner for the year 1930, respondent erroneously disallowed a loss sustained by petitioner in that year in the sum of $2455.00 arising out of the sale by petitioner of 160 shares of common stock of Caterpillar Tractor Company. In this behalf, petitioner sets forth that said sum of $2455.00 represents an ordinary loss deductible from gross income of petitioner for the year 1930.

V.

The facts upon which petitioner relies as the basis of this proceeding are as follows:

(a) At various times during the period commencing with December 2, 1926, and ending on March 30, 1928, petitioner purchased an aggregate of 725 shares of the capital stock of Standard Oil Company of California, for which said shares of stock petitioner paid the aggregate sum of $41,-046.47. Petitioner continuously held and owned said shares of stock from the time of the respective dates of acquisition until December 30, 1930. During the years 1929 and 1930, petitioner as the owner of said 725 [5] shares of stock received as stock dividends thereon an aggregate of 28 shares of stock, making a total ownership of 753 shares of stock on December 30, 1930. On December 30, 1930, petitioner sold said 753 shares of the capital stock

of Standard Oil Company of California to Burlingame Investment Company, a corporation, for the sum of $33,132.00 and by reason thereof, taxpayer sustained during the year 1930 a "capital loss" in the sum of $7914.47, within the purview of Section 101 of the Revenue Act of 1928.

On May 23, 1930, petitioner purchased 200 shares of the capital stock of Standard Oil Company of California for the sum of $13,845.00. By reason of the ownership of said 200 shares of stock, taxpayer received on December 15, 1930, a dividend of 4 shares of stock, making a total ownership of 204 shares. On December 30, 1930, petitioner sold said 204 shares of the capital stock of Standard Oil Company of California to Burlingame Investment Company, a corporation, for the sum of $8976.00, and as a result thereof, petitioner sustained during the year 1930 a loss in the sum of $4869.00.

Immediately prior to the sale of said 957 shares of stock of Standard Oil Company of California, the certificates evidencing all of said shares of stock stood of record in the name of petitioner. On December 30, 1930, petitioner duly endorsed all of said certificates of stock and delivered them to Burlingame Investment Company, and on December 30, 1930 said Burlingame Investment Company delivered said certificates of stock, thus endorsed, to the Stock Transfer Office of [6] Standard Oil Company of California at San Francisco, California, with instructions to issue said 957 shares of

stock in the name of Burlingame Investment Company and pursuant to such instructions, said Standard Oil Company of California issued as of December 30, 1930, a new certificate or certificates evidencing said 957 shares of stock in the name of Burlingame Investment Company. Ever since the 30th day of December, 1930, said Burlingame Investment Company has continuously been and now is the sole owner of said 957 shares of the capital stock of Standard Oil Company of California.

(b) On October 17, 1928, petitioner purchased 200 shares of the capital stock of Transamerica Corporation for the sum of $25,070.00. Petitioner continuously held and owned said shares of stock until December 30, 1930. During the years 1929 and 1930 taxpayer, as the owner of said 200 shares of stock, received as stock dividends an aggregate of 336 shares making a total ownership of 536 shares of stock on December 30, 1930.

On December 30, 1930, petitioner sold said 536 shares of the capital stock of Transamerica Corporation to Burlingame Investment Company, a corporation, for the sum of $6432.00, and by reason thereof petitioner sustained during the year 1930 a "capital loss" in the sum of $18,638.00, within the purview of Section 101 of the Revenue Act of 1928.

On January 8, 1929, petitioner, as the then [7] owner of the 200 shares of stock of Transamerica Corporation hereinabove referred to, received a dividend in kind thereof in the form of 5 shares of the capital stock of Bank of America of New York.

The fair market value of said 5 shares of stock of Bank of America of New York at date of acquisition was $967.50, and therefore the cost basis to petitioner of said 5 shares of stock of Bank of America of New York was $967.50. Shortly after the acquisition by petitioner of said 5 shares of stock of Bank of America of New York, he exchanged said shares of stock, in connection with a tax-free reorganization, for 7½ shares of the capital stock of Transamerica Corporation, which said last mentioned shares of stock likewise had a cost basis to petitioner of $967.50. On March 4, 1929, petitioner purchased ½ share of Transamerica Corporation for the sum of $62.50. On June 6, 1930, petitioner purchased 8/100 of a share of Transamerica Corporation for $5.35 and in October, 1930, petitioner purchased 77/100 of a share of Transamerica Corporation for $14.70. On June 3, 1930, petitioner purchased 100 shares of the capital stock of Transamerica Corporation for the sum of $4075.35. During the years 1929 and 1930, petitioner, as the owner of said shares of stock of Transamerica Corporation, referred to in this paragraph, received as stock dividends thereon an aggregate of 16.15 shares of stock, making a total ownership of 125 shares of stock of Transamerica Corporation on December 30, 1930, which had a total cost basis to petitioner of $5125.40.

[8]

On December 30, 1930, petitioner sold said 125 shares of the capital stock of Transamerica Corporation to Burlingame Investment Company, a cor-

poration, for the sum of $1500.00 and by reason thereof, petitioner sustained during the year 1930 a loss in the sum of $3625.40.

Immediately prior to the sale of said 661 shares of stock of Transamerica Corporation, the certificates representing all of said shares of stock stood of record in the name of petitioner. On December 30, 1930, petitioner duly endorsed all of said certificates of stock and delivered them to Burlingame Investment Company, and on December 30, 1930, said Burlingame Investment Company delivered said certificates of stock, thus endorsed, to the Stock Transfer Office of Transamerica Corporation at San Francisco, California, with instructions to issue said 661 shares of stock in the name of Burlingame Investment Company and, pursuant to such instructions, said Transamerica Corporation issued, as of December 30, 1930, a new certificate or certificates evidencing said 661 shares of stock in the name of Burlingame Investment Company. Continuously from December 30, 1930, until the month of February, 1932, said Burlingame Investment Company was the sole owner of said 661 shares of stock, at which said last mentioned time said Burlingame Investment Company sold said 661 shares on the open market and the proceeds of said last mentioned sale were received and retained solely by Burlingame Investment Company.

(c) On February 24, 1929, petitioner purchased [9] 160 shares of the capital stock of Caterpillar Tractor Company for the sum of $6615.00. On De-

cember 30, 1930, petitioner sold said 160 shares of the capital stock of Caterpillar Tractor Company to said Burlingame Investment Company for the sum of $4160 and as a result thereof, petitioner sustained during the year 1930 a loss in the sum of $2455.00.

Immediately prior to the sale of said 160 shares of stock of Caterpillar Tractor Company, the certificates evidencing all of said shares of stock stood of record in the name of petitioner. On December 30, 1930, petitioner duly endorsed all of said certificates of stock and delivered them to Burlingame Investment Company, and on December 30, 1930, said Burlingame Investment Company delivered said certificates of stock, thus endorsed, to Bank of California, N. A., at San Francisco, California, the duly constituted Transfer Agent for the shares of stock of Caterpillar Tractor Company, with instructions to issue said 160 shares of stock in the name of Burlingame Investment Company. Pursuant to such instructions, said Transfer Agent caused to be issued as of December 30, 1930, a new certificate or certificates evidencing said 160 shares of stock in the name of Burlingame Investment Company. Ever since December 30, 1930, said Burlingame Investment Company has continuously been, and now is, the sole owner of said 160 shares of the capital stock of Caterpillar Tractor Company.

(d) Said Burlingame Investment Company was [10] organized as a corporation under the laws of the State of California on the 2nd day of June,

1924, with its office and principal place of business at San Francisco, and was formed by petitioner for the sole purpose of causing said corporation to acquire from petitioner all shares of stock and bonds then owned by petitioner in corporations which were organized under the laws of states other than California. The reason for such action was that at the time of the organization of Burlingame Investment Company petitioner was a resident of the State of California and stocks and bonds owned by petitioner in corporations organized under the laws of states other than California were subjected to inheritance and succession taxes by such other states, in the event of the death of taxpayer and in addition thereto, the requirements of the corporations organized under the laws of such other states were very onerous in connection with the transfer of such stocks, in the event of the death of petitioner.

At all times since its organization, said Burlingame Investment Company has kept separate and complete records and books of account of all securities and other property owned by it and of all transactions had by it, and has annually made its corporate income tax return to the Commissioner of Internal Revenue of the United States. Petitioner has at all times herein mentioned kept separate and complete records and books of account of all securities and other property owned by him and of all transactions had by him. [11] Said sales made by petitioner to Burlingame Investment Company as hereinabove set forth were contemporaneously with

the making of each of such sales appropriately entered and recorded on the books of account of petitioner and said purchases by Burlingame Investment Company from petitioner as hereinabove set forth were contemporaneously with the making of each of such purchases appropriately entered and recorded on the books of account of Burlingame Investment Company.

Each of said sales made by petitioner to Burlingame Investment Company was made at the fair market value of said respective shares of stock upon the date of sale, as evidenced by the listed price at such time on the San Francisco Stock Exchange. Each of said sales made in December, 1930, by petitioner to Burlingame Investment Company was a bona fide sale, without any restrictions or conditions, and ever since the respective time of each of said sales, petitioner has had and now has no interest of any kind or character in any of said shares of stock sold, or any proceeds that may accrue therefrom. At no time has there ever been any agreement or understanding, express or implied, nor is there now any such agreement or understanding between petitioner and Burlingame Investment Company for the return of any of said shares of stock by Burlingame Investment Company to petitioner or for the repurchase by petitioner from said Burlingame Investment Company of any of said shares of stock. [12]

VI.

During the year 1931, petitioner paid to the Collector of Internal Revenue at San Francisco, California, the sum of $5835.46 as and for income taxes for the calendar year 1930.

WHEREFORE, petitioner prays that this Board may hear the proceeding and determine that there is no deficiency in income taxes herein, and for such other relief as may be meet and proper in the premises.

JOHN C. ALTMAN,
RICHARD S. GOLDMAN,
Counsel for Petitioner,
615 Russ Building,
San Francisco, Calif.

State of California,
City and County of San Francisco—ss.

JOHN C. ALTMAN, being first duly sworn, deposes and says: That the petitioner is sojourning outside of the United States. That affiant is the duly appointed attorney in fact of Richard S. McCreery, the petitioner above named, and that attached to the petition and marked Exhibit "C" is a copy of the power of attorney under which affiant is acting; that affiant is acting herein pursuant to the power conferred upon him by said power of attorney; that such power has not been revoked. [13]

For many years immediately last past, affiant has acted as attorney for petitioner and Burlingame

Investment Company, and affiant is fully familiar with all of the business affairs of petitioner and Burlingame Investment Company, and in particular affiant is familiar with the books of account of petitioner and Burlingame Investment Company and all of the facts surrounding the particular sales and transactions set forth in the foregoing petition.

That affiant has read the foregoing petition and is familiar with the statements therein contained and that the facts therein stated are true.

JOHN C. ALTMAN.

Subscribed and sworn to before me this 7th day of August, 1933.

[Seal] LOUIS WIENER,

Notary Public in and for the City and County of San Francisco, State of California. [14]

EXHIBIT "A"
TREASURY DEPARTMENT
Washington

June 29, 1933

Office of
Commissioner of Internal Revenue
Address reply to
Commissioner of Internal Revenue
and refer to
IT:AR:E-2
WPE-60D

Mr. Richard S. McCreery,
114 Sansome Street,
San Francisco, California.
Sir:

You are advised that the determination of your tax liability for the year(s) 1930 discloses a deficiency of $7,162.98, as shown in the statement attached.

In accordance with Section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the at-

tention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the inclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,
GUY T. HELVERING,
Commissioner.
by (Signed) W. T. SHERWOOD,
Acting Deputy Commissioner.

Inclosures:
Statement
Form 870 [15]

STATEMENT

IT:AR:E-2
WPE-60D

In re: Mr. Richard S. McCreery,
114 Sansome Street,
San Francisco, California.

INCOME TAX LIABILITY

Year—1930.
Income Tax Liability—$12,998.44.
Income Tax Assessed—$5,835.46.
Deficiency—$7,162.98.

The deficiency shown herein is based upon the report dated October 26, 1932, prepared by Reve-

nue Agent F. M. Ford, and transmitted to you under date of November 17, 1932, which report is made a part of this letter.

Careful consideration has been accorded your protest dated February 28, 1933, in connection with the findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

A consent which will expire June 30, 1934, except as extended by the provisions of section 277 of the Revenue Act of 1928, is on file for the year 1930.

A copy of this letter, together with a copy of the statement and schedules has been mailed to your representative, John C. Altman, San Francisco, California, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau. [16]

EXHIBIT "B"

TREASURY DEPARTMENT
Internal Revenue Service

Office of
Internal Revenue Agent in Charge
Richard S. McCreery,
114 Sansome St.,
San Francisco, Calif.

San Francisco, Calif.

In re: Income Tax
Date of report: Nov. 17, 1932
Recommendation:

Years—1930.
Additional Tax—$7,162.98.
Overassessment—
Penalties—
Total—

The recommendations which this office proposes to make with respect to your income tax liability as the result of a recent examination by an internal revenue agent are shown in the statement attached.

If you acquiesce in the proposed tax liability the inclosed Form 870 should be executed and forwarded to this office. Your consent on Form 870 to the prompt assessment of any deficiency indicated will stop the running of interest to be assessed on such deficiency under the provisions of section 283(d) of the Revenue Act of 1926 or section 292 of the Revenue Act of 1928, upon a date not later than thirty days after the filing of Form 870 properly

executed. Unless such consent is filed the interest to be assessed under the law upon any deficiency indicated runs to the date the deficiency is assessed and the assessment may be made only as provided by section 274(a) of the Revenue Act of 1926 and/or section 272(a) of the Revenue Act of 1928.

Should you desire to make immediate payment without awaiting formal assessment and notice and demand, you should communicate with the collector of internal revenue at Custom House, San Francisco, inclosing this letter, or a copy thereof. If payment is so made the interest period will terminate on the date of payment.

If you do not acquiesce in the proposed recommendations you should file a protest in writing with this office within 15 days from the date of this letter. Any protest so filed will be given careful consideration and, if you so desire, you will be given an opportunity for a hearing before the recommendations are forwarded to Washington.

Arrangements will be made by this office upon your request to answer any questions which may occur to you in your review of these recommendations.

In any event please sign the inclosed form acknowledging receipt of this letter and related papers and return such form to this office.

Respectfully,

B. W. WILDE, Jr.,

Internal Revenue Agent in Charge.

Inclosures:

Statement of adjustments.

Form 870—Form of acknowledgement. [17]

1

Name—Richard S. McCreery

STATEMENT OF TOTAL TAX LIABILITY

Year—1930

Tax previously Assessed—$5,835.46

Adjustments Proposed in Accompanying Report:

Deficiency—$7,162.98

Overassessment—None

Correct Tax Liability—$12,998.44

Totals

NOTE

The amount shown in the first column of the above statement is the amount assessed on the original return except as indicated in the following summary of adjustments previously made:

Year 19

Original Tax ..... ———

Deficiency assessed ....., 19 , ———

or

Overassessment scheduled....., 19 , ———

Net tax previously assessed..... ———

Year 19 [18]

2

Preliminary Statement

Taxpayer: Richard S. McCreery

Examining Officer: F. M. Ford

Table of Contents

Schedule 1, Block Adjustments,

1-a, Explanation of Charges

2, Computation of Tax

3, Earned Income Credit

Principal cause of additional tax: Disallowance of loss claimed on sale of securities.

All changes were discussed with J. R. Cashman who does not agree to the adjustments.

The taxpayer contends that the sale by the sole stockholder of securities to the corporation results in a deductible loss to the stockholder.

Taxpayer, married, no dependents.

Wife, Mary C. McCreery filed separate return. Exemption $3,500.

Related case: Mary C. McCreery, 10-17-32. [19]

3

Richard S. McCreery

Schedule 1

BLOCK ADJUSTMENTS.

	Return	Additions	Deductions	Corrected
1. Salary	$5,000.00			$5,000.00
3. Interest	3,157.38			3,157.38
4. " on tax free Covenant Bonds	1,195.48			1,195.48
8. Losses on sales	(72684.91)			(29,310.29)
8a. Capital Net Loss				(6,845.65)
10. Dividends	137,170.10			137,170.10
12. Total	$ 73,838.05			$110,367.07
13. Interest paid	205.28			205.28
14. Taxes do	3,962.24			3,962.24
17. Contributions	50.00			50.00
18. Miscellaneous	1,800.71			1,800.71
Total deductions	$ 6,018.23			6,018.23
Net income	67,819.82			104,348.84

Schedule 1-a

EXPLANATION OF CHANGES

(1) Losses on sales per Schedule C of return		72,684.91
Deduct loss claimed on Transamerica, S. O. of California and Caterpillar		36,529.02
Net loss allowed		
Schedule C	$29,310.24	
Schedule D	6,845.65	36,155.89

[20]

4

Richard S. McCreery

SALES OF SECURITIES

Schedule D

CAPITAL NET LOSS

Date	Bought Shares	Security	Cost	Sold Date	Shares	Sale Price	Loss
1927	197	Phillips Petroleum	$9,366.34	12-31	197	$2,495.62	$6,870.72
		Goldman Sachs			fraction	25.07	25.07
							$6,845.65

SCHEDULE C

12-6-29	940	American Radiator	31,613.00	12-31	940	13,939.90	17,691.00
12-8-29	200	American Metals	9,430.00	12-31	200	3,117.00	6,313.00
2-28-29	220	Pacific Lighting	15,920.00	12-31	220	10,835.70	5,084.30
9-30-29	23	Intercoast	402.50	11-18	23	180.66	221.84
Net Loss							$29,310.24

The losses claimed on Standard Oil of California, Transamerica, and Caterpillar resulted from the transfer as of Dec. 31, 1930 of these securities from the taxpayer to the Burlingame Investment Co., a corporation of which he is the sole stockholder. The transfer was made at market value. No question is raised as to the facts involved. The certificates were deposited for transfer prior to the close of the taxable year and a credit was entered for the market price at the date. The other items listed above as December 31st sales were regular sales through brokers, whose statements show the orders executed before the close of the year.

[21]

Richard S. McCreery
Schedule 2
1930

COMPUTATION OF TAX IN CASE OF A CAPITAL NET LOSS

t income from schedule 1		$104,348.84
t income		104,348.84
ıs capital net loss		6,845.65
come subject to surtax		$111,194.49
ss: Dividends	137,170.10	
		137,170.10
lance subject to normal tax		none
Surtax on $111,194.49	13,898.90	13,898.90
Total tax		13,898.90
ss: 12½% on capital net loss $6,845.65	855.71	
Credit of 25% for earned net income from schedule 3	None	
Income tax paid at source 2% of $2,237.50	44.75	900.46
		12,998.44

TAX COMPUTED UNDER SECTIONS 210 AND 211

t income from Schedule 1		104,348.84
come subject to surtax		104,348.84
ss: Dividends	$137,170.10	
		137,170.10
Surtax on $104,384.84	12,529.77	12,529.77
tal tax		$ 12,529.77
ss: Credit of 25%	None	
Income tax paid at source	44.75	
		44.75
lance of tax		12,485.02
x assessable		12,998.44
x previously assessed		5,835.46
ldditional tax to be assessed		$ 7,162.98

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Richard S. McCreery
SCHEDULE 3
1930

COMPUTATION OF EARNED INCOME CREDIT

Earned net income	$5,000.
Credit of 25%	None
Limitation:	
25% of normal tax on net income	None
25% of surtax on earned income	None

[23]

EXHIBIT "C"

KNOW ALL MEN BY THESE PRESENTS: That I, RICHARD S. McCREERY, with my address and office at 155 Montgomery Street, San Francisco, California, have made, constituted and appointed and by these presents do make, constitute and appoint JOHN C. ALTMAN, of San Francisco, California, my true and lawful attorney, for me and in my place and stead to execute and verify a petition to the United States Board of Tax Appeals in connection with the notice of deficiency mailed on June 29, 1933, to me by the Commissioner of Internal Revenue and to make, execute and verify any and all documents of any kind or character in connection with my said income tax liability for the calendar year 1930 as may be necessary or proper in the premises.

GIVING AND GRANTING unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as

fully to all intents and purposes as I might or could do if personally present; hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at Paris, France, this 7th day of August, 1933.

RICHARD S. McCREERY

[Endorsed]: Filed Aug. 12, 1933. [24]

[Title of Court and Cause.]

ANSWER

The Commissioner of Internal Revenue by his attorney E. Barrett Prettyman, General Counsel, Bureau of Internal Revenue, for answer to the Petition filed by the above-named petitioner, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the Petition.

II. Admits the notice of deficiency was mailed to the taxpayer June 29, 1933, but denies the allegations contained in the second sentence of paragraph II of the Petition.

III. Admits the allegations contained in paragraph III of the Petition except the last sentence thereof.

IV. Denies the errors alleged in sub-paragraphs (a), (b), and (c) of paragraph IV of the Petition.

V and VI. Denies the allegations of fact contained in Paragraphs V and VI of the Petition.

Denies generally and specifically each and every allegation of fact not hereinbefore admitted, qualified, or denied.

(Signed) E. BARRETT PRETTYMAN
General Counsel,
Bureau of Internal Revenue.

Of Counsel:
THOMAS F. CALLAHAN,
Special Attorney,
Bureau of Internal Revenue.

tls 9-21-33.

[Endorsed]: Filed Sep. 22, 1933. [25]

[Title of Court and Cause.]

JOHN C. ALTMAN, Esq., for the petitioner.
GEORGE D. BRABSON, Esq., for the respondent.

MEMORANDUM OPINION

MORRIS: The respondent having determined a deficiency in income tax of $7,162.98 for the taxable year 1930, petitioner brings this proceeding for the redetermination thereof, alleging error in the disallowance of losses sustained upon sale of the following: [26]

	Loss Alleged
957 shares Standard Oil Company of California	$12,783.47
661 shares Transamerica Corporation	22,263.40
160 shares Caterpillar Tractor Company	2,455.00

It is alleged that of said $12,783.47 and $22,263.40, $7,914.47 and $18,638, respectively, represent capital losses within the purview of section 101 of the Revenue Act of 1928, and that the balances of said amounts represent ordinary losses.

The petitioner, an individual, whose place of business is in San Francisco, and who designates himself, for income tax purposes, a "capitalist," is the president and sole stockholder—except for two qualifying shares, one held by the petitioner's wife and the other, at first by his son Lawrence McCreery, then J. R. Cashman, and finally by John C. Altman—of Burlingame Investment Company, a California corporation, which he caused to be organized and incorporated under the laws of that State in 1924, and to which he transferred 18 stocks and 7 blocks of bonds, receiving in exchange therefor, 4.000 shares of the capital stock of the company, par value $100 per share. The company is engaged in buying and selling securities. At one time it owned a substantial tract of realty.

On and prior to December 30, 1930 petitioner was the owner of 957 shares of the capital stock of Standard Oil Company of California, 661 shares of Transamerica Corporation, and 160 shares of Cater-

pillar Tractor Company. 753 of the said Standard Oil Company shares, owned by the petitioner continuously for over two years, had a cost basis to him, for income tax purposes, of $41,046.47, and the remainder, 204 shares, owned less than [27] two years, had a cost basis, for such purposes, of $13,845. 536 shares of the Transamerica Corporation stock, owned by the petitioner continuously for more than two years, have a cost basis to him, for income tax purposes, of $25,070 and 125 shares thereof, owned by him for a period less than two years, have a cost basis of $5,120.05. The 160 shares of Caterpillar Tractor Company were owned by the petitioner less than two years, and they have a cost basis to him, for tax purposes, of $6,615.

On December 30, 1930 the petitioner unqualifiedly sold his said shares of stock of Standard Oil Company, Transamerica Corporation and Caterpillar Tractor Company to Burlingame Investment Company at the closing market quotations shown upon the San Francisco Stock Exchange on that date. Those quotations were as follows:

Standard Oil Company of California	$44.00	per share
Transamerica Corporation	12.00	" "
Caterpillar Tractor Company	25.75	" "

Immediately upon the sale of the foregoing shares he endorsed the certificates therefor in the name of Burlington Investment Company and delivered them either on December 30 or 31, 1930 to the respective transfer agents for the three corporations with in-

structions to have new certificates issued in the name of Burlingame Investment Company and in due course, that is, within a few days thereafter, the company received the certificates for the stocks which it had purchased, all dated December 31, 1930. Separate individual books of account were kept by the petitioner from those of the company. Appropriate book entries were made upon the petitioner's [28] individual books of account and upon the books of the company, as of December 31, 1930, showing the sale and the charge therefor, on the one hand, and purchase and liability for payment of the purchase price, on the other, in the following amounts:

957 shares Standard Oil Company of California	$42,108.00
661 shares Transamerica Corporation	7,932.00
160 shares Caterpillar Tractor Company	4,160.00

The petitioner's personal account upon the books of Burlingame Investment Company, in which all transactions between him and the company were recorded, showed a debit balance against him of $38,000 before the credits of $42,108, $7,932 and $4,160, the purchase price of the three stocks hereinbefore discussed, were credited thereto. After his account received the credits for those amounts on December 31, 1930 and after his said account on that same date had been credited with a dividend of $40,000, it showed a credit balance of $56,200, which balance was carried forward in the account to Jan-

uary 1, 1931. No actual payment by the company was made to the petitioner for the purchase price of said stocks. It was at all times possessed of marketable securities, however, several times greater than the amount which it owed.

The foregoing were the only sales transacted between the petitioner and the company during 1930—these were made with income tax deductions in mind. The petitioner did, however, sell securities to others during 1930 upon which he sustained and claimed losses in that year. [29]

In his individual income tax return for the calendar year 1930 the petitioner claimed losses of $12,783.47, $21,290.55, and $2,455, upon the sale of his said shares of Standard Oil Company of California, Transamerica Corporation, and Caterpillar Tractor Company, respectively, which, together with other claimed losses, aggregated $72,684.91.

In commenting upon his disallowance of the said losses claimed by the petitioner the respondent says the following in his deficiency notice:

> The losses claimed on Standard Oil of California, Transamerica, and Caterpillar resulted from the transfer as of Dec. 31, 1930 of these securities from the taxpayer to the Burlingame Investment Co., a corporation of which he is the sole stockholder. The transfer was made at market value. No question is raised as to the facts involved. The certificates were deposited for transfer prior to the close of the taxable year and a credit was entered for the market

price at the date. The other items listed above as December 31st sales were regular sales through brokers, whose statements show the orders executed before the close of the year.

The respondent contends that the alleged sale of the petitioner's securities to Burlingame Investment Company on December 31, 1930, was a "colorable" transaction, therefore, invalid, and that even if held to be valid, it was ineffectual to remove the securities from the dominion and control of the petitioner, consequently, no deductible loss could result. His argument is directed at the dual relationship of sole owner and dominant head of the corporation, on the one hand, dealing with himself in his individual and private capacity, on the other. He points to many cases denouncing this practice under an old and familiar rule. But that [30] rule was designed as a protective measure where the rights of other stockholders or creditors were involved, a situation not present in the instant case.

The respondent seemingly recognizes that Edward Securities Corporation, 30 B. T. A. 918, will be held controlling, though a rather feeble effort to distinguish the two cases was made. In that case one D'Ancona—who owned 9,980 of 9,982 outstanding shares of the capital stock of that petitioner, the two remaining shares being in the hands of others for qualifying purposes—sold certain shares of capital stock to that petitioner in 1929. In the following year, 1930, that petitioner sold the same

shares back to D'Ancona, at market value, and it claimed the loss sustained in that year. The same argument advanced by the respondent here was made there. We held that the corporate entity could not be disregarded, citing Burnet v. Commonwealth Improvement Co., 287 U. S. 415; that the sale of stock by the petitioner to its stockholder, at market —notwithstanding he owned all but two of its shares and was in complete control thereof and all of its activities—was bona fide and that the loss claimed was deductible. The two cases are practically indistinguishable. On the authority of that case we have no other alternative than to sustain the petitioner's contention. See also A. S. Eldridge, 30 B. T. A. 1322.

Decision will be entered under Rule 50.

Entered Jun. 19, 1935. [31]

United States Board of Tax Appeals

Docket No. 73322.

RICHARD S. McCREERY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION.

The parties to the above-entitled proceeding having filed recomputations in accordance with Rule 50

pursuant to memorandum opinion entered herein June 19, 1935, respondent's recomputation showing a deficiency of $1,655.11 and petitioner's recomputation showing a deficiency of $1,655.12 for the year 1930, it is

ORDERED and DECIDED: That there is a deficiency for the year 1930 of $1,655.11.

[Seal] (Signed) LOGAN MORRIS,
Member.

Entered Jul 27 1935. [32]

[Title of Court and Cause.]

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

NOW COMES Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue and George D. Brabson, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

Your petitioner on review, hereinafter referred to as the Commissioner, is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States. Your respondent on review, hereinafter referred to as the taxpayer, is an in-

dividual and an inhabitant of the City of San Francisco, State of California, and filed his income tax return for the year in question with the Collector of Internal Revenue for the First District of California whose office is located in the City of San Francisco, California, and within the judicial circuit of the United States Circuit Court of Appeals for the Ninth Circuit. [33]

II.

The Commissioner determined a deficiency of Federal income taxes against the taxpayer for the calendar year 1930 in the amount of $7,162.98, and on June 29, 1933, in accordance with the provisions of Section 272, Revenue Act of 1928, sent to the taxpayer by registered mail a notice of said deficiency. Thereafter, on August 12, 1933, the taxpayer filed an appeal from said notice of deficiency with the United States Board of Tax Appeals, being Docket No. 73322.

On June 19, 1935, the Board of Tax Appeals promulgated its memorandum opinion, and on July 27, 1935, entered its final order and decision in said appeal wherein and whereby the Board of Tax Appeals ordered and decided that the deficiency determined by the Commissioner was erroneous and that the correct deficiency against the taxpayer for said year was $1,655.11. The opinion of the Board of Tax Appeals is not reported.

III.

The nature of the controversy is as follows:

The taxpayer is an individual residing at San Francisco, California. His business is that of a capitalist and investor in stocks and bonds and real estate. During the year 1930 taxpayer was the owner of 661 shares of Transamerica Corporation, 160 shares of Caterpillar Tractor Company and 957 shares of Standard Oil of California. On December 30, 1930, taxpayer for the purpose of claiming income tax deductions transferred all of said stocks to the Burlingame Investment Company.

The Burlingame Investment Company was a one man corporation organized by the taxpayer in 1924 to hold certain stocks and securities [34] owned by the taxpayer, in order to "avoid paying an inheritance tax on what I call the Eastern securities" in case of taxpayer's death. The corporation had no other business.

All of the stock of the Burlingame Investment Company was owned by taxpayer and all of it was issued to him except two qualifying shares which were issued to his wife and son. The corporation has only three stockholders and directors, the taxpayer, his wife and his son.

The taxpayer has always been president of the corporation; he was sole manager and directed all the affairs of the corporation and "nobody else had anything to do with it." All of the policies and

dealings of the corporation were determined by taxpayer alone and "nobody else had anything to say about that." No one else was ever consulted in regard to the policies of the corporation, except a broker whom the taxpayer consulted from time to time as to the value of certain stocks. But there was no one anywhere who could direct or control the taxpayer in any respect as to the business or policies of the corporation.

The corporation had a bookkeeper who kept not only its books but also the personal books of the taxpayer and the books of the McCreery Estate Company. All three sets of books were kept in the same office under the taxpayer's personal direction and were constantly at his disposal. Taxpayer himself directed how all entries were to be made in each set of books. Since 1924 taxpayer has carried an open account with the Burlingame Investment Company through which taxpayer withdrew funds at will and without consulting anyone. Taxpayer alone determined what investments the corporation should make and how much money the corporation should advance to him. Taxpayer was largely indebted to [35] the corporation from time to time but paid no interest on his indebtedness, nor did the corporation pay him interest "because it was unnecessary."

The transfer of stocks in question on December 30, 1930, was decided upon by taxpayer alone, acting both for himself and for the corporation. There was no corporate resolution and no corporate

action whatever authorizing the purchase of these stocks by the corporation. In fact the corporation at no time authorized the taxpayer to purchase stocks for it except the original purchase in 1924. This alleged sale of December 30, 1930, was the only transaction where taxpayer transferred any stocks to the corporation directly.

Taxpayer was the only officer of the corporation authorized to draw checks on the corporate account. No cash or checks whatever passed from the corporation to the taxpayer in connection with the so-called sale of December 30, 1930. All that taxpayer did was to transfer his stocks to the name of the corporation and all the corporation did was to credit taxpayer's open account on the books with the "purchase price". This was contrary to the corporation's usual practice in crediting taxpayer's open account, the usual practice being to credit his account at the bank.

The books of the corporation were not accurately kept and certain mistakes had occurred in connection with the purchase of stocks, indicating numerous retransfers of stocks from the name of the taxpayer to that of the corporation and vice versa covering the years 1928 to 1930. [36]

In the proceeding before the Board the taxpayer contended that the transfer was a bona fide sale because the corporation was a separate entity which rendered a separate return and paid income taxes thereon and that the corporation entity could not be disregarded.

Respondent contended that the transfer of December 30, 1930, was a sham, an unreal, invalid transaction; that none of the requirements of the law as to sales had been met, that not a single corporation action or resolution which the law requires to constitute a valid corporation transaction, was performed; that the transfer was made solely for the purpose of claiming income tax losses and must therefore comply with the strictest letter of the law.

The Board ignored the facts in the case and held that the sale was bona fide, entirely upon the ground that the corporate entity could not be disregarded.

III.

The Commissioner says that in the record and proceedings before the Board of Tax Appeals and in the decision and final order of redetermination entered by the Board manifest error occurred and intervened to the prejudice of the Commissioner and the Commissioner hereby assigns the following errors which he avers occurred in said record, proceedings, decision and final order of redetermination so entered by the Board, to wit:

1. The Board erred in failing to find as a fact that the Burlingame Investment Company was organized by petitioner to hold certain stocks and securities owned by him in order to "avoid paying an inheritance tax on what I call the Eastern securities", in case of petitioner's death, and that the sales here in question were made for *for* the sole purpose of claiming income tax deductions. [37]

2. The Board erred in failing to find as a fact that the petitioner was president of the corporation and its sole manager, and that he directed all of its affairs and "nobody else had anything to do with it."

3. The Board erred in failing to find as a fact that all of the policies of the corporation including its purchases and sales of stocks were determined by the petitioner alone without consulting other officials or directors of the corporation, and "nobody else had anything to say about that."

4. The Board erred in failing to find as a fact that no one else was ever consulted in regard to the business or policies of the corporation, except that petitioner did consult his broker at times as to certain stock transactions, and that there was no one who could direct petitioner in any respect as to the business or the policies of the corporation.

5. The Board erred in failing to find as a fact that the stocks in question were transferred by petitioner to the Burlingame Investment Company on December 30, 1930; that petitioner alone decided upon that sale by himself as an individual and decided upon the purchase by the corporation; that there was no corporate resolution and corporate action of any sort authorizing or ratifying the purchase of these stocks by the corporation; and that this alleged sale of December 30, 1930 was the only transaction where petitioner sold any stocks to the corporation directly.

6. The Board erred in failing to find as a fact that the Burlingame Investment Company at no

time authorized petitioner to purchase stocks for it except the original transfer of property in return for its capital stock upon organization in 1924. [38]

7. The Board erred in failing to find as a fact that petitioner was the only officer of the Burlingame Investment Company authorized to draw checks on the corporation's account; that no cash passed between the parties and no consideration was given for the transfer of stocks except the book entry, and all that the corporation did was to credit Petitioner's open account with the purchase price. That this was contrary to the corporation's usual practice in crediting petitioner's open account, the usual practice being to credit petitioner's account under such circumstances at the bank.

8. The Board erred in failing to find as a fact that the same bookkeeper kept the books of the corporation and the books of petitioner, as well as the books of the McCreery Estate Company; that all three sets of books were kept in the same office and under petitioner's personal direction and were at his disposal constantly; and that petitioner himself directed how the entries in question were to be made and what entries were to be made in each set of books.

9. The Board erred in failing to find as a fact that from its organization in 1924 petitioner carried an open account on the books of the Burlingame Investment Company through which petitioner withdrew funds at will from the corporation without

interference from anyone; that petitioner alone decided what loans or investments the corporation should make and how much it should loan to him; and that petitioner was indebted to the corporation frequently on account of such withdrawals but that he paid no interest thereon and neither did the corporation pay him interest "because he thought it was unnecessary." [39]

10. The Board erred in failing to find as a fact that the books of the Burlingame Investment Company were not accurately kept and that certain mistakes occurred in conection with the purchase of stocks, the books showing numerous stocks transferred from the name of petitioner to the name of the corporation and vice versa during the years 1928 through 1930, without showing any consideration for such transfers.

11. The Board erred in holding that the transfer of the stocks in question by petitioner to the corporation under the facts of record constituted a bona fide sale of the stocks.

12. The Board erred in holding that the usual requirements of corporate authority or ratification in transactions between the corporation and one of its officers were not necessary in this case.

13. The Board erred in holding that this case was governed by the case of Edwards Securities Corporation, 30 B. T. A. 918, in which an appeal is now pending.

14. The Board erred in holding that the corporate entity here should not be disregarded although the corporation was in fact the alter ego of petitioner.

15. The Board erred in failing to hold for respondent upon the facts of record.

WHEREFORE, the Commissioner petitions that the decision and final order of the Board of Tax Appeals be reviewed by the United States [40] Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be transmitted to the Clerk of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by the said Court.

(Signed) FRANK J. WIDEMAN,
Assistant Attorney General.
(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.
(Sgd.) GEO. D. BRABSON,
Special Attorney,
Bureau of Internal Revenue.

GDB:MFH
9/18/35 [41]

United States of America
District of Columbia—ss.

GEORGE D. BRABSON, being duly sworn, says that he is a Special Attorney in the Office of the Assistant General Counsel, Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof;

that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Sgd) GEORGE D. BRABSON.

Sworn and subscribd to before me this 20 day of September, 1935.

My commission expires Nov. 16, 1937.

(Sgd) GEORGE W. KILIS,
Notary Public.

[Endorsed]: Filed Sep. 23, 1935. [42]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW.

To:

Richard S. McCreery,
155 Montgomery Street,
San Francisco, California.

John C. Altman,
615 Russ Building,
San Francisco, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 23rd day of September, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the deci-

sion of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 23rd day of September, 1935.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for
the Bureau of Internal
Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this 30th day of Sept., 1935.

.....

Respondent on Review.
(Sgd) JOHN C. ALTMAN
Attorney for Respondent on
Review.

[Endorsed]: Filed Oct. 10, 1935. [43]

[Title of Court and Cause.]

STIPULATION OF FACTS.

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that, for the purposes of this proceeding, the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and

further evidence, not inconsistent with the facts herein sipulated to be taken as true:

1. On December 30, 1930, petitioner was the owner of the following shares of stock, which had a cost basis to petitioner, for income tax purposes, in the amounts respectively set opposite the same, and which had been continuously owned and held by petitioner for the periods hereinafter set forth:

(a) 753 shares of the capital stock of Standard Oil Company of California, held and owned continuously for over two years and having a cost basis to petitioner of $41,046.47. [44]

(b) 204 shares of the capital stock of Standard Oil Company of California, having been held and owned for less than two years and having a cost basis to petitioner of $13,845.00.

(c) 536 shares of the Capital Stock of Transamerica Corporation, held and owned continuously for more than two years and having a cost basis to petitioner of $25,070.00.

(d) 125 shares of the capital stock of Transamerica Corporation, having been held and owned for less than two years, and having a cost basis to petitioner of $5,120.05.

(e) 160 shares of the capital stock of Caterpillar Tractor Company, having been held and owned for less than two years, and having a cost basis to petitioner of $6,615.00.

2. On December 30, 1930, the fair market value per share of the stock of each of the three corporations hereinabove referred to, as evidenced by

the listed sale price on said date on the San Francisco Stock Exchange was as follows:

Standard Oil Company of California,	$44.00 per share
Transamerica Corporation,	12.00 per share
Caterpillar Tractor Company,	25.75 per share

JOHN C. ALTMAN
615 Russ Building
San Francisco, Calif.
Counsel for Petitioner.

ROBERT H. JACKSON
General Counsel
Bureau of Internal Revenue
Counsel for Respondent.

[Endorsed]: Filed at Hearing Jul. 13, 1934. [45]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

This cause came on for hearing before the Honorable Logan Morris, Member of the United States Board of Tax Appeals on July 13, 1934, at San Francisco, California. John C. Altman, Esq., appeared for the taxpayer and Robert E. Jackson, Esq., Assistant General Counsel for the Bureau of Internal Revenue and George D. Brabson, Esq., Special Attorney, Bureau of Internal Revenue, appeared for the Commissioner.

Whereupon the taxpayer to maintain the material averments of the petition offered in evidence a stipulation of certain facts in the case signed by counsel for both parties and in words and figures as follows:

IT IS HEREBY STIPULATED by and between the parties hereto by their respective attorneys that, for the purposes of this proceeding, the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence, not inconsistent with the facts herein stipulated to be taken as true:

1. On December 30, 1930, petitioner was the owner of the following shares of stock, which had a cost basis to petitioner, for income tax purposes, in the amounts respectively set opposite the same, [46] and which had been continuously owned and held by petitioner for the periods hereinafter set forth:

(a) 753 shares of the capital stock of Standard Oil Company of California, held and owned continuously for over two years and having a cost basis to petitioner of $41,046.47.

(b) 204 shares of the capital stock of Standard Oil Company of California, having been held and owned for less than two years and having a cost basis to petitioner of $13,845.00.

(c) 536 shares of the Capital Stock of Transamerica Corporation, held and owned continuously

for more than two years and having a cost basis to petitioner of $25,070.00.

(d) 125 shares of the capital stock of Transamerica Corporation, having been held and owned for less than two years, and having a cost basis to petitioner of $5,120.05.

(e) 160 shares of the capital stock of Caterpillar Tractor Company, having been held and owned for less than two years, and having a cost basis to petitioner of $6,615.00.

2. On December 30, 1930, the fair market value per share of the stock of each of the three corporations herein above referred to, as evidenced by the listed sale price on said date on the San Francisco Stock Exchange was as follows:

Standard Oil Company of California, $44.00 per share.

Transamerica Corporation, $12.00 per share.

Caterpillar Tractor Company, $25.75 per share.

[47]

In further support of the averments of the petition, the taxpayer introduced the following oral testimony:

RICHARD S. McCREERY,

the taxpayer, being duly sworn was examined and testified as follows:

Direct Examination

My name is Richard S. McCreery and I am the petitioner herein. I was the owner on December 30, 1930 of 957 shares of Standard Oil of Califor-

(Testimony of Richard S. McCreery.)

nia, 661 shares of Transamerica Corporation, and 160 shares of Caterpillar Tractor Company. On that date I sold all of them to Burlingame Investment Company. This was a California corporation organized in 1924 and continuously in existence since then. Since its organization in 1924, I have owned its entire issued and outstanding capital stock. It was engaged at all times in owning, buying and selling securities, and at one time owned one substantial piece of real estate. I have been president of the Burlingame Investment Company since its organization and the sole person in charge of its active affairs.

These various shares of stock aforesaid were sold to the Burlingame Investment Company at the closing market price of the San Francisco Stock Exchange on December 30, 1930. Each of those stocks were dealt in and listed on the San Francisco Stock Exchange. I ascertained the closing price on that day and that was the price at which I sold them. On that day the certificates representing all of these shares of stock stood in my name individually and were in my possession. Immediately after the sale I endorsed the certificates over to the Burlingame Investment Company. It took two or three days to make the transfers. All of [48] these endorsed certificates were actually delivered over on December 30th or 31st, 1930 to the respective transfer agents of the three issuing companies with instructions to have new certificates issued in the name of the Burlin-

(Testimony of Richard S. McCreery.)

game Investment Company. Within a few days thereafter the Burlingame Investment Company received certificates of stock representing all the shares aforesaid issued in its own name.

My counsel shows me ten certificates of stock of Standard Oil Company of California, one for fifty-seven shares and nine for one hundred shares each, each certificate issued in the name of Burlingame Investment Company, and each certificate issued is dated December 31, 1930. Each of these certificates is unendorsed and has been continuously in the possession of Burlingame Investment Company since a few days after December 31, 1930.

The same is true of two certificates of Caterpillar Tractor Compay, one for sixty shares and one for one hundred shares each endorsed and issued in the name of Burlingame Investment Company, each dated December 31, 1930, and each continuously in the possession of Burlingame Investment Company since that time.

The certificates representing the shares of stock of Transamerica Corporation which were sold to the Burlingame Investment Company on December 30, 1930, were sold by it in 1932. The Burlingame Investment Company received certificates issued in its name for 661 shares Transamerica Corporation about the same time it received the certificates of Standard Oil Company and Caterpillar Tractor Company, all these certificates being similarly dated December 31, 1930. The Burlingame Investment

(Testimony of Richard S. McCreery.)

Company continuously owned and held the Transamerica shares [49] from that time until the date of their sale by it in 1932. These 661 shares of Transamerica were sold in the open market by Burlingame Investment Company through a broker. I did not purchase them nor do I know who the purchaser was. The Burlingame Investment Company received the net proceeds of the sale of the 661 shares aforesaid and retained them solely for itself. I received no part thereof.

From the time the Burlingame Investment Company acquired these shares of stock of Standard Oil Company and Caterpillar it received all dividends paid on those stocks down to the present time and it has retained all those dividends for its own purposes. It received all dividends paid on the Transamerica stock from the time of acquisition in December, 1930 to the time of sale in 1932. There was no agreement between me and the Burlingame Investment Company at any time either written or oral whereby I had the right to repurchase any of these shares of stock I sold to the Burlingame Investment Company, or that I would receive any of them back or any interest therein.

The Burlingame Investment Company since its organization in 1924 has kept separate books of account consisting of a ledger and cash book and a journal. I did not personally write up the accounts in the books but I supervised them. The Burlingame Investment Company had a bookkeeper

(Testimony of Richard S. McCreery.)

and I supervised all entries, and they were all original entries made at the respective times any transaction was reported. In these books of account there was recorded all items of income, dividends, interest, sales, purchases, etc., and all financial transactions and every item. [50]

I have kept separate books of account for my own affairs consisting of a ledger, journal and cash book. These books were also kept under my supervision by a bookkeeper and in those books there has been entered regularly at the time any transaction occurred or any item of income was received or any item paid out, the particular item. I have here my original individual ledger. At the request of my counsel I turn to account No. 98 in that ledger entitled Standard Oil of California. It reads as follows: December 31, 1930, 957 shares, and the amount is $42,108.00. That represents the sale by me of my 957 shares of Standard Oil of California to the Burlingame Investment Company which I have just testified to. That entry was made on that date.

I turn to ledger account No. 31-A, which is headed Transamerica Corporation, and under it December 31, 1930, 661 shares, $7,932.00. That entry represents the sale by me of those shares I have just testified to.

I turn to ledger account No. 100-A entitled Caterpillar Tractor Company stock and I find the entry as follows: December 31, 1930, 60 shares, $4,160.00.

(Testimony of Richard S. McCreery.)

That represents the sale of those particular shares to Burlingame Investment Company.

I turn to account No. 7 entitled Burlingame Investment Company. That is an account between me and the Burlingame Investment Company and it records charges and credits between the two of us. I find the following entries in that account:

December 31, Standard Oil of California,	$42,108.00
December 31, Transamerica	7,932.00
December 31, Caterpillar	4,160.00.

[51]

These entries record the moneys charged to the account of the Burlingame Investment Company on my books.

Under the same account there is the succeeding entry of the same date to wit, December 31, 1930, dividend No. 6, $40,000.00. That represents a dividend that was declared on that date by the Burlingame Investment Company of which I was sole stockholder at that time. Payment thereof was made by my charging the account of Burlingame Investment Company. Similarly, when I received money for the Burlingame Investment Company I credited that particular account. Immediately prior to the sale the books show that the net account between me and the Burlingame Investment Company recorded that I owed the company $38,000.00. These charges to the Burlingame Investment Company were offset against that and left a credit balance in my favor of some $16,000.00.

(Testimony of Richard S. McCreery.)

I identify this book my counsel hands me as the original ledger of the Burlingame Investment Company. In it I find on page 127 an account entitled Standard Oil Company of California stock, and under that account an entry reading as follows: December 31, 1930, 957 shares, $42,108.00. That was to record the purchase by the Burlingame Investment Company of those shares of stock from me. Similarly on page 127 there is an account entitled Transamerica Corporation stock and under it an entry reading: December 31, 1930, 661 shares, $7,932.00. That is to record the purchase by the Burlingame Investment Company from me of those shares.

On page 132 of the Burlingame Investment Company's original ledger I find an account entitled Caterpillar Tractor Company and under it an entry reading: December 31, 1930, purchase of 160 shares, $4,160.00. That is to record the purchase by the Burlingame Investment Company of those shares from me. [52]

I now turn to page 2 of the Burlingame Investment Company ledger to an account entitled Richard S. McCreery. That is the account of the Burlingame Investment Company with me, and that corresponds with the similar entries I have just showed in this ledger of my account with it. I find in this account the following entries:

(Testimony of Richard S. McCreery.)

December 31, 1930, 957 shares Standard Oil of California,	$42,108.00
December 31, 1930, 661 shares Transamerica	7,932.00
December 31, 1930, 160 shares Caterpillar	4,160.00

Those entries record the credit to my account on my books showing money due from the Burlingame Investment Company.

Immediately following those entries I find another one dated December 31, 1930, dividend No. 6, $40,000.00. That is the same dividend I referred to above in my testimony about the Burlingame Investment Company books, and it shows that I am crediting myself with the amount of that dividend.

Mr. BRABSON: While we have that ledger, can't we turn to the cash account and see if any checks were issued on or about the same time, in payment of this stock?

Mr. ALTMAN: There were no checks issued.

Mr. BRABSON: No checks issued. That is admitted as a fact?

Mr. ALTMAN: At this time there were no checks issued. The debits and credits——

Mr. BRABSON: Were all that took place.

Mr. ALTMAN: ——were all that took place.

This entry my counsel has just asked about in the Burlingame Investment Company ledger of a $40,000.00 dividend is the same dividend that I referred to a moment ago in respect of my own ledger. [53]

(Testimony of Richard S. McCreery.)

Q. In connection with the declaration and payment by the Burlingame Investment Company to you of dividends during all of these years did you receive actual cash for those dividends at the particular moment?

A. No.

Q. The manner of payment was to credit your account with them?

A. At the bank.

Q. And on your books charged them with them?

A. Yes.

The Burlingame Investment Company at no time in its history has owed any moneys to anybody but me. At all times when it owed any money to me it has had marketable securities salable on a recognized stock exchange of at least three, four or five or six times the value it ever owed me. At some times I was indebted on a net basis to the Burlingame Investment Company. On the question of these purchases and sales of stock between me and the Burlingame Investment Company it was the custom in vogue from the beginning that any gain one way or the other would be recorded by respective credits or debits on each book. And from time to time these accounts between us were paid down so that they were even or one owed instead of the other. Every day the books of both the Burlingame Investment Company and myself showed the exact status of that account between us.

(Testimony of Richard S. McCreery.)

I testified a few moments ago that at the time the sale was made by me of all these shares aforesaid I was at that time indebted to the Burlingame Investment Company in the sum of $38,000.00. The sale price paid by the Burlingame Investment Company was credited against that and the balance credited to my account. [54]

Cross-Examination

My business from 1924 to 1930 personally was simply stocks and bonds and one piece of real estate. I reported myself in my income tax return as a capitalist. By this I meant that I was investing in stocks and bonds and real estate. This was the same business as the Burlingame Investment Company more or less, except personally I was interested in a cattle ranch.

I organized the Burlingame Investment Company, and all the stock was owned by me except one share which was owned by my wife. I have testified on direct examination that I managed the affairs of the corporation entirely and "nobody else had anything to do with it." There were no other directors except myself, my wife and the secretary of the corporation. His name when we first formed the corporation was Cashman. He did not own any stock in it, but we had to appoint somebody—we had to have a man to supervise the thing.

Q. You do not mean he was a director then. You mean he was a straw man. He was a bookkeeper, is that the idea?

A. Yes.

(Testimony of Richard S. McCreery.)

Mr. ALTMAN: Mr. Brabson, if I may interrupt. There have always been two shares issued for qualification purposes, one for his wife as a director and one for the third director. As a matter of fact, Mr. Lawrence McCreery, his son, since deceased, was the third director and secretary, and when he died, J. R. Cashman became the third director and secretary; and when Cashman left, since about two years ago I have been the third director and secretary, with purely a qualifying share to entitle the director to act. As a matter of fact, I think Mr. McCreery [55] is the beneficial owner of the one share.

Mr. BRABSON: You will stipulate that?

The MEMBER: Is that statement just made stipulated?

Mr. ALTMAN: Yes.

The MEMBER: The record will so show.

Since I was the owner of all the stock and directed all the affairs of the company as I have just testified, I therefore directed the policies of the company and nobody else had anything to say about that.

The stock of the Burlingame Investment Company originally issued to me was issued in exchange for all of the California stocks. By that I mean stocks of corporations organized under the laws of California. I have here the original minute book, and in accordance with the books a block of some

(Testimony of Richard S. McCreery.)

eighteen stocks and seven blocks of bonds were turned over to the Burlingame Investment Company by me.

Mr. ALTMAN: We will stipulate that there were 4,000 issued to Mr. McCreery in exchange for the securities, but that two lots of one share each were issued to his wife and son to qualify. Each share had a par value of $100.00.

I arrived at the value of the stocks—that is a long time ago now, ten years ago, but I think it was taken at what they were supposed to be worth at that time; that is what they were worth on the market at all times. I think every share was on the market. I never bought things that were not on the market.

The bookkeeper in my office kept the books of the Burlingame Investment Company. In 1930 the name of the bookkeeper was Mrs. Aggeler. She also kept my personal books. Both sets of books were kept in my office. I had the same office as the Burlingame Investment Company. [56] The McCreery Estate Company also had the same office, that is all three had the same office in the same place. I did not keep the books; I supervised all of them.

Q. In other words, you directed what entries were to be made in the books of all three?

A. Well, whenever any sale or purchase was made, the checks came in and were given to the bookkeeper.

(Testimony of Richard S. McCreery.)

Every sale or purchase of stocks and bonds, the brokers sent in the statements and they were entered by the bookkeeper. When I made sales of stocks to the company I told them—I said they were to be entered to my account or to the Burlingame Investment Company or to the McCreery Estate Account. In other words, I directed how the entries were to be made more or less.

To my recollection my wife filed a separate return for 1930. Asked why, I would say that she always did. I am not going to swear to anything that I am not positive of. To my recollection I think she did but I am not going to swear to it because I might be wrong.

The Burlingame Investment Company was a company formed with the object that in case of my death—I am still alive and this was ten years ago—we would avoid paying an inheritance tax on what I call the eastern securities, foreign securities, because we bought them here in California. It had no other business at all. I did not transfer securities to the Burlingame Investment Company from time to time over a period of years. I bought securities sometimes through the Burlingame Investment Company but I never transferred them. They were bought outright on the market. In other words, so far as I know and I think I am right, these transactions in question are the only cases in which I sold stocks to the Burlingame Investment Company direct. [57]

(Testimony of Richard S. McCreery.)

I carried an open account with the Burlingame Investment Company from its very beginning and I still do. I have stated before that I was indebted to the corporation on that account sometimes. I paid no interest on my indebtedness to the corporation and they paid no interest to me, because it was unnecessary.

Asked whether there was anyone anywhere who could direct me in any respect in regard to what should be done as to the business of the Burlingame Investment Company, my answer is that I might have taken some advice about stocks and bonds from somebody who I thought knew more about it than I did but otherwise I directed the whole thing. I did consult brokers at some times, yes.

Q. Did you draw the checks of the company?

A. Which company?

Q. The Burlingame Investment Company.

A. If I drew any money out?

Q. No.

A. They had a separate account.

Q. Who issued the checks for the Burlingame Investment Company when it went to pay for anything?

A. I did, on a separate bank account.

Q. You withdrew funds from the company on this open account between you and the company whenever you desired, didn't you?

A. Whenever the financial condition or situation

(Testimony of Richard S. McCreery.)

warranted it, yes.

There was no one to prevent me doing that as long as the thing was in order. I directed the policy of the company. I ultimately was the one who decided what investments the Burlingame Investment Company should make but I used to consult sometimes two or three people, friends of mine who were stock brokers or in the banking business. As I have just told you I used to get advice from outsiders. But they had no interest in the company. There was no one who could say no if I wanted to buy a stock for the company. [58] I also decided what loans, if any, the Burlingame Investment Company should make. I also decided how much money the Burlingame Investment Company should lend to me. There was no one else who could decide that.

I was the one who decided on the three sales made December 30, 1930 in question here.

Q. That is what I say, who else could. Was there any corporate authorization or resolution of the corporation authorizing this purchase?

A. Yes. I consulted my wife always.

Q. And that was the resolution, was it?

A. Yes.

Q. O. K. That is all the resolution there was?

A. And when my son was alive, I consulted him.

Q. I ask you again, was there any formal resolution of the corporation authorizing the Burlingame Investment Company to buy this stock?

A. There was.

(Testimony of Richard S. McCreery.)

Q. Let us see it.

Mr. ALTMAN: There was no resolution.

Mr. BRABSON: You admit there was no resolution?

Mr. ALTMAN: As a matter of fact there was no corporate resolution authorizing the purchase of any security, from the inception down to date. As secretary, I can so state.

Mr. BRABSON: All right. I am glad to have that.

The MEMBER: Is that stipulated in the record?

Mr. ALTMAN: That is stipulated.

The MEMBER: The record will so show.

Mr. ALTMAN: The record may show there was authorization from the beginning authorizing Mr. McCreery to sell any shares of stock of the corporation. [59]

No one had authority to sign checks of the corporation except me. I have none of the checks here at the hearing but at the office there are loads of them. No checks were actually issued in payment for the stocks which I transferred to the Burlingame Investment Company on December 30, 1930. No checks were ever issued in payment for those stocks; they were transferred.

It was stipulated by the parties at this point that the account between the taxpayer and the Burlingame Investment Company was balanced on May 22, 1930.

On October 30, 1930, the records show that I was

(Testimony of Richard S. McCreery.)

indebted to the Burlingame Investment Company in the sum of $58,000.00 even.

At this point it was stipulated that the taxpayer was actually indebted to the corporation in the amount of $58,000.00 on October 30, 1930.

I have testified that no interest was ever paid on the balances which I owed to the corporation. No one ever asked me to repay this $58,000.00. I repaid it of my own free will. I had the money to do it.

At this point the respondent offered in evidence a transcript of the account between the taxpayer and the Burlingame Investment Company which was received in evidence as respondent's Exhibit A.

I have already stated that no dividends were ever paid on the stock of the Burlingame Investment Company except to me.

At this point it was stipulated by the parties that there were no sales one way or the other between the parties during the year 1930 except the three that are under consideration in this case. [60]

Asked how I came to make the sales of these three stocks on this particular day December 30, 1930, my answer is that I thought it was an advisable thing to do, to transfer the stocks out of myself over to the Burlingame Investment Company without any idea of profit to myself. I knew at the time that if I made a bona fide sale of this sort I would be entitled to take a deduction from my income tax. I was so advised by my attorney. I admitted to the

(Testimony of Richard S. McCreery.)

Bureau of Internal Revenue agents here in San Francisco that my purpose in making this sale was to save just such deductions on my income tax. Asked how much I saved thereby, my answer is that I transferred some stocks to the Burlingame Investment Company on which I had to pay quite a heavy income tax because it showed a profit, which I paid. So I was not trying to avoid any taxation in that way. I did sell other stocks during 1930 on the open market and my return shows that. I did buy and sell stocks occasionally. The list of all stocks and bonds I bought are all down on the books.

At this point the parties stipulated that in the calendar year 1930 the taxpayer sold on the open market 197 shares of Phillips Petroleum, 940 shares American Radiator, 200 shares American Metals, 220 shares Pacific Lighting, 23 shares of Intercoast Trade. It was further stipulated that the taxpayer claimed a loss on the Phillips Petroleum, the American Radiator, the American Metals, the Pacific Lighting, and on the Intercoast Trade.

In fact I claimed a loss on all of the stocks I sold on the open market in 1930. [61]

My income tax return shows that I claimed a loss of $72,684.91 from the sale of miscellaneous stocks in 1930. That is shown in my return.

At this point the respondent offered the taxpayer's return in evidence. The return was received in evidence as respondent's Exhibit B over the objection of counsel for the taxpayer upon the

(Testimony of Richard S. McCreery.)

ground that it is incompetent, irrelevant and immaterial to this specific case.

At this point the parties stipulated that the balance sheet of the Burlingame Investment Company showing comparative financial statements as of December 31, 1929 and December 31, 1930, shows, among other things, the following:

LIABILITIES

December 31, 1929 (Notes payable of Mary C. McCreery and R. S. McCreery)	$51,506.91
December 31, 1930 (Notes payable of Mary C. McCreery and R. S. McCreery)	59,560.00

It was further stipulated that the market value of the assets of the corporation were approximately as shown upon the balance sheets.

In explanation of the above figures it was agreed that those figures were the total liabilities of the corporation on the date shown other than capital stock, and that the assets at those particular times had a value of at least $600,000.00 in each of those years.

On my direct examination I have testified that there was no agreement between the Burlingame Investment Company and me as to the repurchase of these stocks.

Q. Turn to your personal ledger under the account Burlingame Investment Company, account No. 7, and under the debit side of that ledger I find certain entries such as 300 shares Western Pacific [62] Railroad Company showing a debit to that account of $23,842.50 as of April 30, 1926. And a similar entry on the same day, 200 shares of Eastman stock, $22,000.00. I will ask you why are they on the debit side of that account.

(Testimony of Richard S. McCreery.)

Q. I will ask you why are they on the debit side of that account. I am speaking of these entries.

A. Well, sometimes I am not here all the time in San Francisco. We have a big cattle ranch and I go down there very often and sometimes I put in an order to buy stocks and bonds and perhaps that order can not be filled for some days, and when it was filled I might be away. They sometimes made a mistake and put them down to the Burlingame Investment Company or to me, and I instructed them to buy them for the Burlingame Investment Company or myself and I had them changed.

Q. Your explanation is that those represented mistakes on the part of the broker.

A. Well, mistakes on the part of the broker in a way, if you like, because I was away and they did not remember or know if I had bought them for the Burlingame Investment Company or for myself.

Q. You mean to say they were taken in your name and later transferred to the Burlingame Investment Company.

A. If there was a mistake and they were bought for me, they were transferred at once to the Burlingame Investment Company [63] without any charge at all, at the price I paid for them, no interest or anything else, except accrued interest on the bonds. Mr. Altman, I think you have a list of those things, haven't you?

Q. Now, I find in your personal ledger under the same account, Burlingame Investment Com-

(Testimony of Richard S. McCreery.)

pany, numerous instances of where that same error has occurred. In 1927 I find other entries of the same sort. Standard Oil of California, for example, on January 10, 1928. And all through 1930 I find some Standard Oil of California and Transamerica.

Mr. ALTMAN: Those were the sales he testified to in 1930, those three.

It was here stipulated by the parties that there were no correctional entries later than January 10, 1928.

Q. I am asking you if you make the same explanation for those correctional entries up through January 10, 1928.

A. Yes sir, the same.

I have testified on direct examination that my books show an entry showing each transaction between me as an individual and the Burlingame Investment Company. [64]

Q. Will you point out either in your individual ledger or in the ledger of the Burlingame Investment Company where you were given credit for payment or where the Burlingame Investment Company was given credit for payment of this stock which you say it purchased from you? Strike out as regards you. I mean the Burlingame Investment Company was given credit for payment of this stock to you.

A. Those stocks that I sold to the Burlingame Investment Company did not go through the brokers, to save the brokers' fee. It was a genuine sale.

(Testimony of Richard S. McCreery.)

Q. You say they did not go through the brokers in order to save the brokers' fees.

A. Yes.

Q. They were made direct from you to the corporation.

A. They were.

Q. Never passed through brokers' or anybody else's hands?

A. They had to be transferred. They went through the transfer office and were endorsed. You can see the stock there.

Redirect Examination

On cross examination I stated that California stocks were acquired by the Burlingame Investment Company and later I stated stocks outside of California. I wish to correct my testimony to read that the corporation acquired outside stocks.

Mr. ALTMAN: Q. Were you on January 27, 1931 the owner of 1,155 shares of stock of the Southern California Edison Company? To refresh your recollection I will point out to you account No. 42-A in your ledger? [65]

The foregoing question and any answer were objected to by counsel for respondent upon the ground that the period referred to is beyond the date of the taxable period in question and is irrelevant, incompetent and immaterial. The objection was overruled and the witness allowed to answer.

A. Yes, on January 27, 1931, I sold those 1,155

(Testimony of Richard S. McCreery.)

to the Burlingame Investment Company at the market price on that date. There is an entry in account No. 42-A of the ledger dated January 27, 1931, sold 1,155 shares $49,665.00. That is the entry representing that sale. I did not think that I had made that much profit.

I turn to my personal books and my account with the Burlingame Investment Company and under account No. 7 on my books I find an entry dated January 27, 1931, 1,155 shares Southern California Edison $49,665.00. That represents a charge I made against the Burlingame Investment Company for the purchase price.

The parties here stipulated that the same entries of sale were made and crediting Mr. McCreery's account with the Burlingame Investment Company with the amount of them, but the correctness of the entries was not stipulated.

My counsel has handed me my individual income tax return for the year 1931. I find under Schedule C therein attached to the return a schedule showing the sale of 105 shares Southern California Edison acquired April 19, 1930, amount realized $4,515.00, cost $2,625.00; profit $1,890.00. Again under Schedule D, I find 1,050 shares Southern California Edison sold during 1931, acquired 1928; amount realized $45,150.00, cost $34,145.54, profit $11,004.35. These two items [66] segregated represent my return for the year 1931 for income tax purposes on the 1,155 shares I have just testified to.

(Testimony of Richard S. McCreery.)

I find on the face of the return tax payable of $5,024.14. During the year 1932 I paid the full amount of that tax.

Counsel for respondent made the following statement in support of his objection to the testimony relating to the year 1931 as follows:

In the first place, there is no proof of profit; there is no proof of cost; there is no proof that this taxpayer may not have reported this for the purpose of offsetting a great many things which he might have had. There are a great many reasons, in other words, why this taxpayer may have made this transfer in 1931. He may have desired to report profit on that particular transaction. I do not think anything which has been introduced in evidence here today is proof of that cost, proof of the validity, or that it was a bona fide sale. That is all.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the Bureau of Internal Revenue.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Ap-

(Testimony of Richard S. McCreery.)

peals, and the same is approved by the undersigned as attorney for the respondent on review.

.....,

Attorney for Respondent on Review. [67]

The foregoing is all of the material evidence adduced at the hearing and in order that the same may be preserved and made a part of the record, this statement of evidence is duly approved and settled this ..... day of October, 1935.

.....

Member, United States Board of Tax Appeals.

[Endorsed]: Lodged Oct. 29, 1935.

[Endorsed]: Approved and ordered filed this 28th day of Dec., 1935. (Sgd) Logan Morris, Member. [68]

[Title of Court and Cause.]

PRAECIPE FOR RECORD.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of

Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board, including:

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5.

(a) Stipulation of facts.

(b) Statement of evidence as settled and allowed.

6. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for the
Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 4 day of November, 1935.

.....

Respondent.
(Sgd) JOHN C. ALTMAN,
Attorney for Respondent on
Review.

[Endorsed]: Filed Nov. 16, 1935. [69]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 69, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 13th day of January, 1936.

[Seal] B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 8105. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Richard S. McCreery, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 18, 1936.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8105

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD S. MCCREERY, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

ROBERT H. JACKSON,
Assistant Attorney General.
SEWALL KEY,
BERRYMAN GREEN,
Special Assistants to the Attorney General.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 8105

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

RICHARD S. MCCREERY, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 27–33), which is not reported.

JURISDICTION

This case involves a deficiency in income tax for the calendar year 1930 (R. 33–34). The Commissioner of Internal Revenue determined a deficiency in the sum of $7,162.98 for the taxable year (R. 16–17). The Board redetermined the deficiency in the amount of $1,655.11 (R. 33–34). This appeal, which involves the sum of $5,507.87, is taken

from a decision of the Board of Tax Appeals entered on July 27, 1935 (R. 33–34), and is brought to this Court by petition for review filed September 23, 1935 (R. 34–44), pursuant to the provisions of Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 603 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 873, and Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTION PRESENTED

The respondent wholly owned and controlled a corporation. At the end of the tax year for the purpose of establishing a deductible loss, the respondent transferred certain stock to the corporation. No cash passed from the corporation to the respondent, but the respondent received a credit on the books of the corporation. Was the transfer sufficient to justify the claimed deduction from the respondent's gross income under Section 23 (e) (2) of the Revenue Act of 1928?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved appear in the Appendix, *infra,* pp. 28–30.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 28–31), and as they appear from the statement of evidence (R. 47–72), are substantially as follows:

The respondent is an individual who designates himself for income tax purposes a "capitalist", whose place of business is in San Francisco, California, and is the president and sole stockholder, except for two qualifying shares, of Burlingame Investment Company, a California corporation, which the respondent caused to be organized and incorporated under the laws of that State in 1924 (R. 28). The company is engaged in buying and selling securities and at one time owned a substantial tract of real estate (R. 28).

From the statement of evidence it appears that the respondent was the sole person in charge of the corporation's active affairs (R. 50), and that he managed the affairs of the corporation entirely and "nobody else had anything to do with it" (R. 58). The respondent supervised the books of the corporation and all entries made therein (R. 52–53).

The respondent always carried an open account with the corporation from its creation and still does so. He was sometimes indebted to the corporation on that account but paid no interest to the corporation on account of his indebtedness, and the corporation paid no interest to the respondent on account of indebtedness "because it was unnecessary" (R. 62). There was no one who could gainsay the respondent if he wanted to buy stock for the company, or lend the company's money, and decisions on these scores were the decisions of

the respondent (R. 63). The respondent issued the checks of the Burlingame Investment Company (R. 64).

The Board of Tax Appeals found that on and prior to December 30, 1930, the respondent was the owner of 957 shares of the capital stock of Standard Oil Company of California, 661 shares of Transamerica Corporation, and 160 shares of Caterpillar Tractor Company. Of the said Standard Oil Company shares, owned by the respondent continuously for over two years, 753 had a cost basis to him, for income tax purposes, of $41,046.47, and the remainder, 204 shares, owned less than two years, had a cost basis, for such purposes, of $13,845. Of the Transamerica Corporation stock, owned by the respondent continuously for more than two years, 536 shares have a cost basis to him, for income tax purposes, of $25,070, and 125 shares thereof, owned by him for a period less than two years, have a cost basis of $5,120.05. The 160 shares of Caterpillar Tractor Company were owned by the respondent less than two years, and they have a cost basis to him, for tax purposes, of $6,615 (R. 28–29).

On December 30, 1930, the respondent unqualifiedly sold his said shares of stock of Standard Oil Company, Transamerica Corporation and Caterpillar Tractor Company to Burlingame Investment Company at the closing market quotations shown

upon the San Francisco Stock Exchange on that date. Those quotations were as follows (R. 29):

	Per share
Standard Oil Company of California	$44.00
Transamerica Corporation	12.00
Caterpillar Tractor Company	25.75

Immediately upon the sale of the foregoing shares he endorsed the certificates therefor in the name of the Burlingame Investment Company and delivered them either on December 30 or 31, 1930, to the respective transfer agents for the three corporations with instructions to have new certificates issued in the name of Burlingame Investment Company and in due course, that is, within a few days thereafter, the company received the certificates for the stocks which it had purchased, all dated December 31, 1930. Separate individual books of account were kept by the respondent from those of the company. Appropriate book entries were made upon the respondent's individual books of account and upon the books of the company, as of December 31, 1930, showing the sale and the charge therefor, on the one hand, and purchase and liability for payment of the purchase price, on the other, in the following amounts (R. 30):

957 shares Standard Oil Company of California	$42,108.00
661 shares Transamerica Corporation	7,932.00
160 shares Caterpillar Tractor Company	4,160.00

The respondent's personal account upon the books of Burlingame Investment Company, in which all transactions between him and the com-

pany were recorded, showed a debit balance against him of $38,000 before the credits of $42,108, $7,932, and $4,160, the purchase price of the three stocks hereinbefore discussed, were credited thereto. After his account received the credits for those amounts on December 31, 1930, and after his said account on that same date had been credited with a dividend of $40,000, it showed a credit balance of $56,200, which balance was carried forward in the account to January 1, 1931. No actual payment by the company was made to the respondent for the purchase price of said stocks. It was at all times possessed of marketable securities, however, several times greater than the amount which it owed (R. 30–31).

The foregoing were the only sales transacted between the respondent and the company during 1930—these were made with income tax deductions in mind. The respondent did, however, sell securities to others during 1930 upon which he sustained and claimed losses in that year (R. 31).

In his individual income tax return for the calendar year 1930 the respondent claimed losses of $12,783.47, $21,290.55, and $2,455, upon the sale of his said shares of Standard Oil Company of California, Transamerica Corporation, and Caterpillar Tractor Company, respectively, which, together with other claimed losses, aggregated $72,-684.91 (R. 31).

The Commissioner disallowed the claimed losses on the ground that the alleged sale of the respond-

ent's securities to the corporation was a "colorable" transaction and invalid, and that even if held to be valid it was ineffectual to remove the securities in question from the dominion and control of the respondent, hence no deductible loss resulted. The Board of Tax Appeals held that the claimed losses were deductible under the statute, and accordingly determined that there was no deficiency on this account in the respondent's income tax for the taxable year. It is from this decision that the Commissioner here appeals.

SPECIFICATION OF ERRORS TO BE URGED

The Board of Tax Appeals erred in not finding and holding that the transfer of the securities here in question by the respondent to his wholly owned and controlled corporation was insufficient to justify the deduction of the amount of the claimed losses from the taxpayer's gross income for the calendar year 1930. In connection with and as a part of this specification of errors, the assignments of error set out in the petition for review (R. 34–43) are hereby included herein as fully and completely as if again set forth at this point *in haec verba*. The ensuing argument is intended to apply to each and every of said assignments of error, jointly and severally.

SUMMARY OF ARGUMENT

1. The relationship between the respondent and his wholly owned and controlled corporation was far closer and more intimate than the relationship

ordinarily existing between a stockholder and his corporation. The personal affairs of the respondent were so closely entwined with the business affairs of the corporation as to render it impossible to differentiate between the two personalities in this transaction. In the light of this situation, no real loss could arise out of dealings between the respondent and the corporation. The alleged losses were a mere matter of bookkeeping, and in so far as the respondent is concerned, were never established by an identifiable event, and no loss was finally and definitely realized by the respondent in the instant case.

2. The evidence in this case compels the view that the corporation was completely dominated and used by the respondent in his personal affairs and for that specific purpose. There is no evidence to show that the transaction here in issue was to serve legitimate corporate purposes. Where this close relationship is present, a transaction which has as its purpose the avoidance of income tax offered by the respondent as giving rise to a deductible loss is subject to close and searching scrutiny, and the burden is on the respondent to show that he has in reality sustained a final and complete loss. The respondent's evidence in this case does not sustain the required burden of proof.

3. Section 23 (e) (2) of the Revenue Act of 1928 and its predecessors were never intended to establish a new class of losses, i. e., tax losses. It was

intended to apply to losses resulting from and in the usual course of a taxpayer's business. The evidence in this case falls far short of showing an ordinary business transaction. To the contrary, the evidence does disclose a transfer by the respondent under most unusual circumstances for the purpose of avoiding tax.

ARGUMENT

The relationship between the respondent and the corporation was not the usual relationship ordinarily existing between a stockholder and a corporation. The relationship was far closer and more intimate than such a relationship, and of such an unusual nature as to demand that the identity of the corporation as such be disregarded and that it be treated as the respondent's *alter ego*. The personal affairs of the respondent were so closely entwined with the business affairs of the corporation as to render it impossible to differentiate between the two in the transaction in issue. (a) The respondent owned all the stock of the corporation except two qualifying shares (R. 28). (b) The respondent was president of the corporation (R. 28); the sole person in charge of its active affairs (R. 50); supervised the keeping of the books of account of the corporation and all entries therein (R. 52–53); no one else had anything to do with the corporation (R. 58); the books of the corporation were kept in the respondent's office (R. 60); the re-

spondent issued the checks for the corporation (R. 62), and no one else had authority to sign such checks excepting the respondent (R. 64). The respondent directed the policy of the corporation (R. 63), and from the time of its organization the respondent carried an open account with the Burlingame Investment Company, and while sometimes indebted to the corporation on that account, he paid no interest to the corporation on account of the indebtedness "because it was unnecessary" (R. 62). (c) The corporation did not adopt resolutions authorizing the purchase of the stock from the respondent (R. 63–64). The respondent represented both himself and the corporation in the alleged sale (R. 63). At the time of the transaction here in issue the respondent received no money from the corporation for the stock transferred to it (R. 64), but only a credit entry on the corporate books (R. 55–56). The respondent testified that the stock was transferred to the corporation in order that he might take a deduction from his income tax (R. 65).

The memorandum opinion of the Board of Tax Appeals failed to make specific findings which under the circumstances of this case the Board should have found from the evidence introduced before it. The failure of the Board to find many of the material facts stated in the foregoing paragraph has been assigned as error in the petition for review. For the sake of brevity and to avoid repetition, we refer to the assignments of error set out

in the petition for review in the instant case (R. 39–43), and particularly to assignments of error Numbers 2, 3, 4, 5, 6, 7, 8, 9, and 10.

In considering these facts we are concerned with the ultimate conclusion as to whether, when grouped and considered together, they are sufficient to entitle the taxpayer to the deduction which he claims. This is a question of law. *United States* v. *Pugh,* 99 U. S. 265, 269–271; *Winton* v. *Amos,* 255 U. S. 373, 395; *Botany Mills* v. *United States,* 278 U. S. 282; *Ox Fibre Brush Co.* v. *Blair,* 32 F. (2d) 42 (C. C. A. 4th), affirmed *sub nom. Lucas* v. *Ox Fibre Brush Co.,* 281 U. S. 115; *Cohen* v. *Commissioner,* 31 F. (2d) 874, 876 (C. C. A. 4th).

In determining the legal effect of the primary facts, substance rather than form is the determinative element (*United States* v. *Phellis,* 257 U. S. 156); regard is to be had for "the very truth of the matter" (*Eisner* v. *Macomber,* 252 U. S. 189, 211). And in deciding what is the substance of a given transaction the entire plan is to be considered; and this means the plan, not alone as it was conceived, but as it was carried out and completed. One element of the plan is its effect upon the taxpayer; whether his position is changed or left unchanged thereby. *Bourjois, Inc.,* v. *McGowan,* 12 Fed. Supp. 787 (W. D. N. Y.); *Shoenberg* v. *Commissioner,* 77 F. (2d) 446 (C. C. A. 8th).

The Board considered that the fact that the respondent was dealing with a corporation was determinative of the question here presented. The

separate entity theory seems to be the basis of the decision. The doctrine "has had in the past a degree of sanctity which was perhaps beyond its deserts. Only the naive still rely too completely on it. * * * It has worked hardship upon taxpayers and has diminished revenue. * * * Today it is a twilight zone of thought and land of shadow. * * *" 5 Paul and Mertens, Law of Federal Income Taxation 833. The theory is governed by the same rules in tax cases as prevail in other cases. The separate identity may be ignored where it otherwise would present an obstacle to the due protection or enforcement of public or private rights. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 442. It has been stated that the owners of a corporation will not be permitted to use the fiction for subversive purposes. *Farmers' Loan & Trust Co.* v. *Pierson,* 222 N. Y. S. 532. There is "a growing tendency * * * in the courts to look beyond the corporate form to the purposes of it and to the officers who are identified with that purpose." *McCaskill Co.* v. *United States,* 216 U. S. 504, 515. See *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417. The language of Lord Mansfield in *Johnson* v. *Smith,* 2 Burn 950, is particularly apropos. He there said (p. 962) that:

> * * * the court would not endure that a *mere form,* or *fiction of law,* introduced for the sake of justice, should work a *wrong,* contrary to the real truth and substance of the thing. * * *

It is always "the act of operation" that we are concerned with. Cf. *Berkey* v. *Third Avenue Railway Co.,* 244 N. Y. 84, 95. A corporation, accordingly, is more nearly a method than a thing. It is hardly more than a name for a useful and usual collection of jural relations, each one of which must in every instance be ascertained, analyzed, and assigned to its appropriate place according to the circumstances of the particular case, having due regard to the purpose to be achieved. *Farmers' Loan & Trust Co.* v. *Pierson, supra* (pp. 543–544).

The Supreme Court has frequently had occasion to disregard the separate juristic personality of the corporation. *United States* v. *Lehigh Valley R. R. Co.,* 220 U. S. 257, 272–274; *Chicago, M. & St. P. Ry.* v. *Minn. Civic Assn.,* 247 U. S. 490, 500–501. (Cf. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 353–354, wherein the acts of the stockholders were treated as the acts of the corporation; and *Mammoth Oil Co.* v. *United States,* 275 U. S. 13, 52, wherein the failure of the owner of the defendant corporation to testify was said to make "strongly against the company." Indeed, the Court seemed to treat the owner and the corporation as one and the same). The separate entity of the corporation has been ignored on several occasions by the Supreme Court in tax cases. *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330; *Gulf Oil Corp.* v. *Lewellyn,* 248 U. S. 71; *United States* v.

Johnston, 268 U. S. 220, 227. Of course, the latter cases do not lay down any general rule of law; they were rested upon the *ultimate fact* that in those cases the separate identity did not exist. The facts in this case are as "peculiar", in showing the lack of a separate personality on the part of the corporation, as were the facts in those cases. The latest case in which the Supreme Court has ignored the corporate entity is *Gregory* v. *Helvering,* 293 U. S. 465.

Where the stockholders do not distinguish between the corporate business and their own individual affairs there is no reason why the courts should, at the request of such stockholders, make this distinction. 13 Calif. Law Rev. 235, 236; *Bauernschmidt* v. *Bauernschmidt,* 101 Md. 148, 161–162. This rule has been applied in varying situations on many occasions by the Federal courts. *United States* v. *Milwaukee Refrigerator Transit Co.,* 142 Fed. 247 (E. D. Wis.); *In re Reiger, Kapner & Altmark,* 157 Fed. 609 (S. D. Ohio); *Alpha Portland Cement Co.* v. *United States,* 261 Fed. 339 (C. C. A. 3d); *Majestic Co.* v. *Orpheum Circuit,* 21 F. (2d) 720, 724 (C. C. A. 8th); *Owl Fumigating Corp.* v. *California Cyanide Co.,* 24 F. (2d) 718 (Del.); *Wagner* v. *Lucas* 38 F. (2d) 391 (App. D. C.); *Farkas* v. *Katz,* 54 F. (2d) 1061 (C. C. A. 5th). This rule has been recognized by this Court. *Smith* v. *Moore,* 199 Fed. 689. The rule has been applied by many State courts. *Bank* v. *Trebein,* 59 Ohio St. 316; *Booth* v. *Bunce,* 33 N. Y.

139; *Starr Burying Ground Asso.* v. *North Lane Cemetery Asso.,* 77 Conn. 83; *Gamer Paper Co.* v. *Tuscany,* 264 S. W. 132, 135 (Tex.).

The principle of the cases above discussed requires that this factual situation be realized. The corporation could not have held a higher status in this transaction than that of agent or *alter ego* for the respondent. Cf. *Shoenberg* v. *Commissioner,* 77 F. (2d) 446 (C. C. A. 8th); *Ballwood Co.* v. *Commissioner* (C. C. A. 3d); decided July 16, 1935, not officially reported, but found in 1935 C. C. H., Vol. 3–A, par. 9504. In view of this situation a loss could not arise out of dealings between them in any real sense. Cf. *Wishon-Watson Co.* v. *Commissioner,* 66 F. (2d) 52 (C. C. A. 9th); *Silvertown Motor Co.* v. *United States,* 62 C. Cls. 171; *Rubay Co.* v. *Commissioner,* 9 B. T. A. 133. The claimed loss was at the most a mere matter of bookkeeping. The purchase price was paid in the form of a mere book entry on the corporation's books, and, under all of the facts, the corporation was a mere agent, *alter ego,* or business channel for the respondent, the individual. Hence, the claimed loss was never established by an identifiable event definitely placing legal and equitable title and control beyond respondent. *M. I. Stewart & Co.* v. *Commissioner,* 2 B. T. A. 737.

The evidence in this case, as we have analyzed and discussed it above, supports, we submit, only one conclusion, i. e., that the corporation was completely dominated and used by respondent in his

personal affairs and to his personal ends. There is no evidence to show that this transaction was to serve legitimate corporate purposes. The transfer of the stock in the instant case was harmonious with the respondent's practice in the use of the corporation for personal purposes. Had the respondent sold the stock in the open market he would no doubt have sustained deductible losses for the reason that the losses would have been established by an identifiable event placing the legal and equitable title to and control over the stock definitely beyond the respondent. This the respondent did not do. He merely transferred the stock to the corporation "at the market" and set up a credit to himself on the books to reflect the sales price. No corporate purpose was served thereby, and thereafter the control of the stock at the least remained just as definitely and absolutely in the respondent as it had theretofore been. The sole benefit of the transaction could have been only to the respondent: an attempt to establish a deductible loss.

A transaction between a stockholder and his corporation is always closely scrutinized. *Glenwood Hotel Co.* v. *Commissioner,* 5 B. T. A. 985; *John M. Burdine Realty Co.* v. *Commissioner,* 20 B. T. A. 54. When such a relationship exists it is incumbent upon the taxpayer "to establish not only an actual sale, but its good faith as well." *Wishon-Watson Co.* v. *Commissioner, supra* (p. 55). We submit that the taxpayer's proof fails to meet that test. There has not been shown the

reality (*United States* v. *Flannery,* 268 U. S. 98), finality, and completeness (*United States* v. *White Dental Co.,* 274 U. S. 398) of the loss. The *prima facie* presumption in favor of the Commissioner's determination certainly requires evidence establishing those things with certainty; the evidence in this case is clearly insufficient to overcome the presumption.

It is extremely doubtful under the facts of this case that even technical legal title to the stock ever passed to the corporation. The relationship between the respondent and the corporation was such as to disqualify him from acting for it in the transaction. Certainly, the burden of affirmatively providing good faith rested upon the taxpayer in this case. *Wishon-Watson Co.* v. *Commissioner, supra.*

Section 23 (e) (2) of the Revenue Act of 1928 and its predecessors were never intended to establish a new class of losses, i. e., tax losses. Each of those statutes was intended to apply to losses resulting from the usual course of a taxpayer's business. Such reasoning was applied in construing the tax-free reorganization provisions of the Revenue Acts. *Gregory* v. *Helvering, supra* (293 U. S. 465). The Court there said (p. 470):

> The rule which excludes from consideration the motive of tax avoidance is not pertinent to the situation, because the transaction upon its face lies outside the plain intent of the statute. To hold otherwise would be to exalt artifice above reality and to deprive

> the statutory provision in question of all serious purpose.

This rule was applied in the case of sales between stockholders and their corporation. *Commissioner* v. *Riggs,* 78 F. (2d) 1004 (C. C. A. 3d). The court there said (p. 1005):

> The decisive thing is whether or not what has been done is "the thing which the statute intended." The taxpayer must bring himself within the intent of the statute upon which he relies, and in the case at bar the taxpayers did not do so. They did not undergo business losses such as are actually contemplated in the statute, but conceived the losses in paper transactions in order to escape the burden of their tax liability.

The Revenue Acts contemplate the deduction of losses arising out of sales entered into "for reasons germane to the conduct of the venture in hand." To dodge taxes can hardly be said to be one of the transactions contemplated by the term "sale." Cf. *Gregory* v. *Helvering, supra.*[1] In that case the court refused to accept a corporate reorganization as tax free although there had been a ritualistic compliance with Section 112 (i) (1) (A) of the Revenue Act of 1928. The ground for the court's decision was that the sole purpose was to escape taxation and the reorganization served no legitimate business purpose. The law, in allowing de-

[1] See also the opinion of the Circuit Court of Appeals for the Second Circuit, 69 F. (2d) 809, 811.

ductions, "certainly contemplates that from legitimate transactions legitimate results shall be deduced." *Silvertown Motor Co.* v. *United States,* 62 C. Cls. 171, 178.[2]

The test of germaneness, for the first time clearly enunciated in the *Gregory* case and clearly and definitely applied to a claimed deduction of a loss arising out of an alleged sale in the *Riggs* case, is supported by the provisions of the revenue acts. The income-tax provisions of the various revenue acts have reflected a great difference in the manner of treating gains and losses. The prime objective of all income-tax acts is, of course, to tax incomes. To grant deductions is not an object of such acts, although such deductions are allowed in a few instances, and only as a matter of legislative grace. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440. A taxpayer is not entitled to a deduction from gross income as a matter of right. *Lynch* v. *Alworth-Stephens Co.,* 267 U. S. 364. Income includes "income * * * of whatever kind and in whatever form paid * * * derived from any source what-

[2] The Supreme Court has declared that, in construing a statute, it is not always confined to a literal reading, and may consider its object and purpose and the things with which it is dealing, so as to effectuate, rather than destroy the spirit and force of the law. *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 293. The intention of the legislative body will prevail even against the letter of the statute. *Fleischmann Co.* v. *United States*, 270 U. S. 349, 360; *Hawaii* v. *Mankichi*, 190 U. S. 197, 212; *Petri* v. *Commercial Bank*, 142 U. S. 644, 650.

ever." Section 22 (a) of the Revenue Act of 1928.[3] Thus Congress has included within the definition of income, and hence has reached for taxation, subject to such deductions as it may allow, "gains or profits and income derived from any source whatever." Section 22 (a) of the Revenue Act of 1928. This provision is sufficiently broad to cover all gains, whether from cash transactions or not. "The intent of Congress was to levy the tax * * * upon all sorts of income." See *Choteau* v. *Burnet,* 283 U. S. 691, 694.[4] Losses present an entirely different situation. It was not necessary that Congress should provide for the deduction of any losses whatever. There is this distinction between gains and losses in the very provisions of the revenue acts: Profits, gains, and income of all types are taxable and the idea of germaneness is not included within those provisions; however, when we come to the provisions relating to deductions and tax-

[3] The same language is contained in prior and subsequent revenue acts. For example, Section 22 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169; Section 22 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680 (U. S. C., Title 26, Sec. 22); Section 213 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9; Section 213 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 213 (a) of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 213 (a) of the Revenue Act of 1918, c. 18, 40 Stat. 1057; Section 2 (a) of the Revenue Act of 1916, c. 463, 39 Stat. 756.

[4] "* * * a reference to * * * the act passed following the sixteenth amendment will disclose a more embracing phraseology than mere 'net income'." *Baldwin Locomotive Works* v. *McCoach*, 215 Fed. 967, 969 (E. D. Pa.).

free transactions we find that throughout those provisions there runs this thread of germaneness, as enunciated by the court in the *Gregory* case.

In this connection it is interesting to trace the history of the present loss provisions. Under the Corporation Excise Tax Act of 1909 corporations were allowed to deduct "all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties * * * [and] all losses actually sustained within the year and not compensated by insurance or otherwise." Section 38, Second. This language was contained in the income tax provisions of the Revenue Act of 1913 (except that the business expenses did not have to be paid out of income). Section II G (b). In addition, the 1913 Act permitted individuals to deduct "losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise." Section II B, Fourth. The only change made in the 1916 Act and in the 1917 Act in the right to corporations to deduct losses was a provision that such losses must be charged off within the year. As to individuals, these last-named acts added losses from "other casualty, and from theft", and from "transactions entered into for profit but not connected with his business or trade * * * to an amount not exceeding the profits arising therefrom." Section 5 (a). The

1918 Act allowed the same deductions as the 1916 and 1917 Acts and removed the restriction with respect to the limited deductibility of losses arising from transactions entered into for profit but not connected with the taxpayer's trade or business. In other words, the 1918 Act permitted the deduction of all losses sustained during the taxable year "if incurred in any transaction entered into for profit." Section 214 (a) (5) of the Revenue Act of 1918. It is obvious that the provisions of the later revenue acts relating to deductions originated with Section 38, Second, of the Corporation Excise Tax Act of 1909. Certainly the provision of the 1913 Act relating to deductible losses of individual taxpayers was no broader than the provision relating to deductible losses of corporations. Sections II B (Fourth) and II G (b) (Fourth). The provision allowing the deduction of a loss "in any transaction entered into for profit" is contrasted with the provision allowing the deduction of losses incurred "in trade or business." The terms "trade or business" comprehend all activities for gain, profit, or livelihood entered into with sufficient frequency or occupying such portion of one's time or attention as to constitute a vocation, an occupation, or a profession (Mim. 3283, IV–I Cumulative Bulletin 14), whereas the provision as to any transaction entered into for gain or profit relates to isolated business transactions. Thus the history of the provisions relating to deductible

losses supports the theory that the losses must be legitimate business losses; they must arise out of transactions germane to the conduct of the venture in hand; hence, the claimed losses must be business realities.

The distinction between a gain and a loss is further illustrated by the fact that income may be accrued, and when so accrued, is taxable. Sections 41, 42, and 43 of the Revenue Act of 1928.[5] See *United States* v. *Anderson,* 269 U. S. 422. However, there is no provision in the acts for accruing losses. On the contrary, the provisions relating thereto require the loss to be actually sustained in order to be deductible. *United States* v. *Flannery, supra.* Cf. *Eckert* v. *Burnet,* 283 U. S. 140. Another example is to be found in the fact that while gains from illegal transactions have been held to be taxable under all revenue acts subsequent to the one of 1913, losses on such transactions are not deductible. Klein, Federal Income Taxation, p. 503; Article 41 of Regulations 45. See S. M. 2680, III–2 Cumulative Bulletin 110; S. M. 2680A, IV–1 Cumulative Bulletin 147; L. O. 1092, I–1 Cumulative Bulletin 270; I. T. 1854 and 1865, II–2 Cumulative Bulletin 125. The correctness of the theory of the *Gregory* and *Riggs* cases, namely, that the claimed loss to be deductible must arise out of a

[5] For like provisions in earlier acts see Sections 212 (b), 213 (a), and 200 (d) of the Revenue Acts of 1924, 1921, and 1918.

genuine business transaction, is further shown by an analysis of the provisions relating to deductions. Referring to these provisions, as found in the Revenue Act of 1928, Section 23 (a) allows as a deduction "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any *trade or business*" (italics supplied), as well as rentals or other payments for the use or possession, "for purposes of the *trade or business*" (italics supplied), of property now used by the taxpayer. Again Section 23 (e) (1) deals with "Losses sustained * * *, if incurred in *trade or business*" (italics supplied); and Section 23 (e) (2) permits the deduction of losses *sustained* "if incurred in any transaction entered into for profit." In other words, isolated ventures are here recognized, where entered into for profit. The key word in this provision is "profit", which definitely relates the statute to isolated *business* ventures.[6] Section 23 (e) (3) relates to losses *sustained* of property not connected with a trade or business by an act of God or by theft—if not compensated for. In other words, the loss must

[6] Profit is "the gain resulting from the employment of capital—the excess of receipts over expenditures." *Fechteler* v. *Palm Bros. & Co.*, 133 Fed. 462, 469 (C. C. A. 6th). It is "the advantage or gain resulting from the investment of capital, or the acquisition of money beyond the amount expended; a pecuniary gain." *Goldsborough* v. *Burnet*, 46 F. (2d) 432, 433 (C. C. A. 4th). The Treasury rulings have been consistent with these definitions.

be actual, not synthetic. Section 23 (j) refers to debts *ascertained* to be worthless. Section 23 (k) and (l) applies only to trades or businesses. The normal basis for determining the amount of gain or loss from a sale is the cost. Section 113 (a). The entire amount of such gain or loss is to be recognized. Section 112 (a). "* * * the loss shall be the excess of such basis over the amount realized." Section 111 (a). It is obvious from the very terms of these pertinent statutes that Congress was allowing deductions for losses growing out of the usual course of a taxpayer's business or commercial endeavors. Such endeavors must be the source of the claimed loss. Certainly, we submit, it cannot be said that Congress enacted these provisions for deductions merely for the purpose of enabling taxpayers to evade the taxes imposed by other provisions of the Act.[7] "The mind rebels

[7] In *Holy Trinity Church* v. *United States*, 143 U. S. 457, the Court said (p. 459): "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. As said in Plowden, 205: 'From which cases, it appears that the sages

against the notion that Congress * * * was willing to foster an opportunity for juggling so facile and so obvious." See *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 330.

We are not unmindful that the decision of this Court in *Commissioner* v. *Eldridge,* 79 F. (2d) 629, was on facts hardly distinguishable from those in the instant case, and that the argument advanced on behalf of the Commissioner in the instant case is in all respects identical with that advanced on behalf of the Commissioner in the *Eldridge* case. In the *Eldridge* case the Board of Tax Appeals made no finding on the evidence tending to prove in that case a peculiar intertwining of the personal affairs of the taxpayer with the affairs of the corporation. In that case the failure of the Board to make such findings was not assigned as error and hence that evidence was not before the Court and the Court affirmed the decision of the Board because there was substantial evidence to support such findings as were made by the Board. In the

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of the law heretofore have construed statutes quite contrary to the letter in some appearance, and those statutes which comprehend all things in the letter they have expounded to extend to but some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only, which expositions have always been founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the act, sometimes by comparing one part of the act with another, and sometimes by foreign circumstances.' "

instant case the failure of the Board to make findings on the evidence before it which tended to prove a peculiar intertwining of the personal affairs of the respondent with the affairs of the corporation, and that they were in effect a single identity for all practical purposes, to be treated as such, has been assigned as error. As we have hereinbefore pointed out, for this reason we submit that the decision in the *Eldridge* case is not determinative here where the record properly presents the issue and that issue is to be determined by a full review warranted by the assignments of error, which was not the situation in the *Eldridge* case.

CONCLUSION

In conclusion we respectfully submit that the decision of the Board of Tax Appeals is erroneous and should be reserved.

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APRIL 1936.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 11. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax equal to the sum of the following:

* * * * *

SEC. 12. SURTAX ON INDIVIDUALS.

(a) *Rates of surtax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every individual a surtax as follows:

* * * * *

SEC. 21. NET INCOME.

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

* * * * *

(2) If incurred in any transaction entered into for profit, though not connected with the trade or business; * * *.

* * * * *

SEC. 118. LOSS ON SALE OF STOCK OR SECURITIES.

In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed under section 23 (e) (2) of this title; nor shall such deduction be allowed under section 23 (f) unless the claim is made by a corporation, a dealer in stocks or securities, and with respect to a transaction made in the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 171. *Losses.*— * * *
>
> Losses must usually be evidenced by closed and completed transactions. * * *
>
> ART. 174. *Shrinkage in value of stocks.*— A person possessing stock of a corporation cannot deduct from gross income any amount claimed as a loss merely on account of shrinkage in value of such stock through fluctuation of the market or otherwise. The loss allowable in such cases is that actually suffered when the stock is disposed of. If stock of a corporation becomes worthless, its cost or other basis determined under section 113 may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made, as in the case of bad debts. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1936

No. 8105

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

RICHARD S. McCREERY,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This appeal involves a deficiency in income tax for the year 1930. The undisputed facts may be summarized as follows:

Burlingame Investment Company was organized by respondent under the laws of California in 1924. (R. 28.) Certain stocks and bonds then owned by respondent were transferred to Burlingame Investment Company and in exchange therefor all of the stock of the Company was issued to respondent with the exception of two qualifying shares which were issued to respondent's wife and son. (R. 28.) Continuously thereafter down to and including the year 1930 the Company was engaged in the business of owning, buying and selling securities; at one time it owned

one substantial piece of real estate. Respondent was president of the Company continuously since its organization and the sole person in charge of its active affairs. (R. 50.)

At all times since its organization, the Burlingame Investment Company kept separate books of account consisting of a ledger, cash book and journal wherein there was currently recorded all items of income, dividends, interest, sales, purchases and financial transactions appertaining to the Company. Similarly, respondent kept separate books of account for his own affairs. (R. 52, 53.) The Company at all times maintained a separate bank account. (R. 62.)

On and prior to December 30, 1930, respondent owned certain shares of the capital stock of Standard Oil Company of California, Transamerica Corporation and Caterpillar Tractor Company. (R. 28, 29.) On December 30, 1930, respondent unqualifiedly sold these shares of stock to Burlingame Investment Company at the closing market quotations shown upon the San Francisco Stock Exchange on that date. (R. 29.) Upon the sale of these shares, respondent immediately endorsed the certificates therefor and caused such certificates to be delivered to the respective transfer agents for the three corporations with instructions to have new certificates issued in the name of Burlingame Investment Company. Within a few days thereafter, the Company received the certificates for the stocks which it had purchased, all dated December 30, 1930, and issued in its name. Appropriate book entries were made upon respondent's individual

books of account and upon the books of the Company, as of December 31, 1930, showing the sale and charge therefor, on the one hand, and the purchase and liability for payment of the purchase price, on the other. (R. 29, 30.) At all times respondent carried a personal account with the corporation, which reflected the daily status of the account between him and the corporation and which recorded charges and credits between them. Immediately prior to the sale by respondent to the corporation on December 30, 1930, of the said shares of stock, the status of the personal account between respondent and the corporation showed that respondent was indebted to the corporation in the sum of $38,000.00. After respondent received credit for $54,200.00 representing the sale price of the stocks, his personal account, instead of showing a debit balance of $38,000.00, showed a credit balance of $16,200.00. Immediately following the foregoing entries in the personal account, respondent was credited on the same date with the sum of $40,000.00, representing dividend No. 6 declared on that date by the corporation. As a matter of fact, all dividends declared from time to time by the corporation on its outstanding shares were paid to respondent, not in cash, but by credit to his personal account; but such dividends were returned by respondent, for income tax purposes, as of the date of declaration and credit. Respondent received no cash from the corporation at the time of sale by him of the stocks, but credit was given to respondent for the sale price on both the books of account of respondent and Burlingame Investment Company in the manner heretofore indi-

cated. The corporation was at all times possessed of marketable securities several times greater than the amount which it owed to respondent. (R. 31.)

The Transamerica shares were continuously owned and held by Burlingame Investment Company until 1932 when they were sold by the Company through a broker on the open market. The Company received the net proceeds of the sale and retained them solely for itself. The shares of stock of Standard Oil Company of California and Caterpillar Tractor Company were retained by Burlingame Investment Company and were still held and owned by it at the date of trial. (R. 51, 52.) All dividends paid on the stocks were received by Burlingame Investment Company and retained by it for its own purposes. (R. 52.) At no time was there any agreement whereby respondent had the right to repurchase or reacquire any of the foregoing shares of stock or any interest therein, nor did he reacquire any of said shares. (R. 52.)

In his individual income tax return for the calendar year 1930, respondent claimed losses upon the sale of the foregoing shares of stock to Burlingame Investment Company. The Commissioner disallowed the losses claimed by respondent upon the ground that the sale was a "colorable" transaction and therefore invalid, and that even if held to be valid, no deductible loss could result because the sale was ineffectual to remove the securities from the dominion and control of respondent. (R. 31, 32.) Accordingly, the Commissioner determined a deficiency in income tax of $7162.98 for the year 1930. (R. 27.) The Board

of Tax Appeals held that the claimed losses were deductible under the statute and expunged the deficiency attributable to the disallowance of such loss. The parties filed recomputations showing a deficiency of $1655.11 and the Board of Tax Appeals ordered and decided that the correct deficiency due from respondent for the year 1930 was $1655.11. (R. 34.) This latter amount is not in dispute.

The Commissioner is appealing from the decision of the Board.

QUESTION INVOLVED.

The sole question involved herein is whether the sale of securities by respondent during the year 1930 to a corporation of which he was the owner of all of the shares of stock entitles respondent to deduct, as a loss in his income tax return for that year, the difference between the cost of the securities to respondent and the price at which they were sold to such corporation.

STATUTE INVOLVED.

The applicable statute is Section 23, subdivision (e) of the Revenue Act of 1928, which is entitled "Deductions from Gross Income" and which provides that

> "In computing net income, there shall be allowed as deductions:
> * * * * * * *
> (e) Losses by individuals. In the case of an individual, losses sustained during the taxable

year and not compensated for by insurance or otherwise.

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft."

Revenue Act of 1928, c. 852, 45 Stat. 791.

ARGUMENT.

No principle of law is more firmly established than the rule that a corporation and its stockholders are separate and distinct entities. True, a corporation is frequently referred to as a fiction. "But it leads nowhere to call a corporation a fiction. If it is a fiction, it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members." (*Klein v. Board of Supervisors,* 282 U. S. 19, 24.) Nor is the corporate entity to be disregarded because stock ownership is concentrated in the hands of one person. As stated in a leading California case, *Erkenbrecher v. Grant,* 187 Cal. 7, 11:

"'* * * the mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons, does not and should not destroy its separate existence. * * *'"

That concentration of stock ownership in one person does not justify disregard of the separate entity of corporation and stockholder has been consistently recognized by the Supreme Court in tax cases.

Burnet v. Commonwealth Improvement Co., 287 U. S. 415;

Dalton v. Bowers, 287 U. S. 404;

Burnet v. Clark, 287 U. S. 410.

Since it must be accepted as an established premise that a corporation is, in the eyes of the law, an entity separate and distinct from that of its sole stockholder, respondent must prevail in this action unless there is some special rule applicable to the deduction of losses resulting from sales by a sole stockholder to the corporation or unless peculiar facts are presented in this case which take the case out of the general rule.

That there is no exception to the general rule in cases where sales are made by an individual to a corporation in which he is the sole stockholder has been definitely settled by decisions of the United States Supreme Court, and Federal Appellate Courts, including this Court.

The exact converse of the situation here presented arose in *Burnet v. Commonwealth Improvement Co.,* 287 U. S. 415. The facts in that case were as follows: One Widener organized the respondent corporation and transferred certain securities to it, re-

ceiving in exchange all of its stock. One of his purposes in organizing the corporation and transferring the securities to it was to avoid multiple inheritance taxes. Upon his death all of the stock in respondent corporation passed to the trustees under his will. Thereafter, the corporation transferred to the trustees certain of the securities that Widener had originally delivered to the corporation. If the corporation and the trustees were to be regarded as separate entities, a taxable gain resulted to the corporation from this transfer but the corporation maintained that it was merely the agent or instrumentality of the trustees of Widener's estate in administering their trust and that, practically considered, the trustees and the corporation were the same entity.

The Supreme Court held, however, that a taxable gain resulted, stating at page 419:

> "Counsel for respondent concede that ordinarily a corporation and its stockholders are separate entities, whether the shares are divided among many or are owned by one. Consequently, they make no effort to support any general rule under which a corporation and its single stockholder have such identity of interest that transactions between them must be disregarded for tax purposes. They submit, however, the peculiar facts here disclosed suffice to show there was really no income, nothing properly taxable as such. They refer to Southern Pacific Co. v. Lowe, 247 U. S. 330, 62 L. ed. 1142, 38 S. Ct. 540, and Gulf Oil Corp. v. Lewellyn, 248 U. S. 71, 63 L.

ed. 133, 39 S. Ct. 35, not as controlling but as instances where the court looked through mere form and regarded substance.

While unusual cases may require disregard of corporate form, we think the record here fails to disclose any circumstances sufficient to support the petitioner's claim. Certainly the Improvement Company and the Estate were separate and distinct entities; the former was avowedly utilized to bring about a change in ownership beneficial to the latter. *For years they were recognized and treated as different things and taxed accordingly upon separate returns.* The situation is not materially different from the not infrequent one where a corporation is controlled by a single stockholder." (Italics supplied.)

The *Commonwealth Improvement* case, while involving a sale by the corporation to its sole stockholder at a profit, rather than by the stockholder to the corporation at a loss, definitely lays down the rule to be applied to the instant case—namely, that gain or loss is to be recognized in transactions between corporations and their sole stockholders.

In *Jones v. Helvering,* 71 Fed. (2d) 214, the Court of Appeals of the District of Columbia, considered a situation identical with that presented in the instant case, except that there were four stockholders instead of one. Liberty bonds owned by the four stockholders were sold to the corporation at the prevailing market price, which was less than the price which the stockholders had paid for the bonds. The purchase price was represented by a credit to each

of the stockholders on the books of account of the corporation. In holding that the transaction was effective to establish deductible losses, for income tax purposes, as to the four stockholders, the Court stated at pages 216 and 217:

> "We fully agree with the Board that the taxpayers had the power to cause the corporation to take the bonds at such price as taxpayers might impose, and, if taxpayers had used this power to make the sale at a fictitious price and thereby create, or attempt to create, a fictitious loss for deduction purposes, we should have an altogether different case and one we should not hesitate to brand as fraudulent in fact, but here, admittedly, the price at which the bonds were sold to the corporation was the market price at the time of sale, and, if the sale was otherwise bona fide, the claimed amount of loss is uncontested.
>
> That brings us back to the single query whether the possession of the power to do the thing the Board denounces, that is to say, the ability through stock ownership to control the corporate action, is sufficient to make a sale otherwise unobjectionable subject to be treated as a nullity for tax purposes. The only argument that can be urged in the affirmative is that it is against public policy to allow a taxpayer to incorporate his business in such a way as through manipulation or transfers between himself and it he can place the one or the other beyond the reach of the taxing statutes, and there is great force to the argument. But, so far as we know, in the cases where the element of fraud in fact is lacking, it has been the invariable holding that a taxpayer may resort to any legal methods available to him

to diminish the amount of his tax liability. Bullen v. State of Wisconsin, 240 U. S. 625, 630, 36 S. Ct. 473, 60 L. ed. 830. In Iowa Bridge Co. v. Commissioner, supra, at page 781 of 39 F. (2d) Judge Gardner, speaking for the Court of Appeals in the Eighth Circuit, said: 'In fact, it is held that even though the transaction is a device to avoid the burden of taxation, or to lessen that burden, it is not for that reason alone illegal'. See also United States v. Isham, 17 Wall. 496, 506, 21 L. Ed. 728. * * * In December, 1921, the corporation bought the bonds and paid for them by crediting the account of each taxpayer in the amount he was entitled to receive, and thereafter it continued to hold the bonds as absolute owner. That the result of this was to enable taxpayers to claim a deductible loss in their income and at the same time, by reason of control of the corporation, to retain an indirect interest in the bonds is undoubtedly true, but it is for the legislature, and not the courts to find a way of taxing such a transaction. As the matter now stands, inequitable as it may appear, there is no statute condemning it. The Supreme Court has been at great pains to point out time and again that a corporation is a legal entity and as such wholly different and distinct from its shareholders."

In view of the decision of the Supreme Court in the *Commonwealth Improvement* case, supra, and the decision of the Court of Appeals of the District of Columbia in the *Jones* case, the holding of this Court in *Commissioner v. Eldridge,* 79 Fed. (2d) 629, was inevitable. That decision, as petitioner frankly ad-

mits on page 26 of its brief in this case "was on facts hardly distinguishable from those in the instant case". All of the stock in the vendee corporation was community property of the two respondents. Respondents transferred securities to the corporation receiving no cash therefor, but being credited on the books of the corporation with the market value of the securities. This Court, in holding that the transfers to the corporation resulted in a deductible loss, stated:

> "Generally, in tax cases, as in other cases, a corporation and its stockholders are to be treated as separate entities. Burnet v. Clark, 287 U. S. 410, 415; Burnet v. Commonwealth Improvement Co., 287 U. S. 415, 420; Dalton v. Bowers, 287 U. S. 404, 410; Klein v. Board of Supervisors, 282 U. S. 19, 24; United States v. Phellis, 257 U. S. 156, 173; Eisner v. Macomber, 252 U. S. 189, 208; Lynch v. Hornby, 247 U. S. 339, 344.
>
> The facts found by the Board of Tax Appeals in this case do not, in our opinion, warrant us in disregarding the separate entity of the corporation. The fact that respondents owned all its stock and were in complete control of it is no reason for disregarding its separate entity. Dalton v. Bowers, supra; Burnet v. Commonwealth Improvement Co., supra; United States v. Phellis, supra; Eisner v. Macomber, supra; Jones v. Helvering, 71 F. (2d) 214, 217.
>
> It is argued by the Commissioner that the transfers by respondents to the corporation were made for the purpose of establishing a deductible loss for income tax purposes. This, if true, is unimportant. A taxpayer may resort to any legal

> method available to him to diminish the amount of his tax liability. Gregory v. Helvering, supra; Superior Oil Co. v. Mississippi, 280 U. S. 390, 395; Bullen v. Wisconsin, 240 U. S. 625, 630; Jones v. Helvering, supra."

To the same effect, see *Edwards Securities Corporation v. Commissioner,* 30 B. T. A. 918, where the converse situation was presented, viz.: the sale of securities by a corporation to its sole stockholder. The loss arising from such sale was held to be deductible for income tax purposes.

It is rather difficult to follow the argument of petitioner on pages 17 to 26 of his brief. Apparently he is contending for the rather startling proposition that Section 23 (e) (2) of the Revenue Act of 1928 and its predecessors were never intended to apply to losses arising from sales by a taxpayer to a solely owned corporation, notwithstanding that the facts clearly show that the corporation was a distinct legal entity, that the sale was bona fide and that there was no repurchase or intention to repurchase.

Petitioner is thus trying to read into the Revenue Act of 1928 a provision which found its way into the Revenue Act of 1934, *but which was not there prior to 1934.* For the first time, Congress enacted in the Revenue Act of 1934 a provision reading as follows:

> "Section 24.
>
> (a) In computing net income no deduction shall in any case be allowed in respect of * * *

(6) loss from sales or exchanges of property directly or indirectly (A) between members of a family, or (B) except in the case of distributions in liquidation, between an individual and a corporation in which such individual owns directly or indirectly more than 50 percentum in value of the outstanding stock * * *"

The House Committee report on the Revenue Act of 1934 in referring to the addition of Section 24 (a) (6), states as follows:

"Family loss: the bill adds to existing law a paragraph which will deny losses to be taken in the case of sales or exchanges of property between members of a family, or between a shareholder and a corporation in which such shareholder owns a majority of the voting stock. The term 'family' is defined to include brothers and sisters, spouse, ancestors, and lineal descendants.

Experience shows that the practice of creating losses through transactions between members of a family and close corporations has been frequently utilized for avoiding the income tax. It is believed that the proposed change will operate to close this loophole of tax avoidance."

A similar provision is embodied in the Senate Committee report on the 1934 Revenue Act.

If it was the intention of Congress under the Revenue Act preceding that of 1934 not to allow losses from sales between a shareholder and a corporation in which such shareholder owned a majority of the voting stock, then there was no need for the enactment of Section 24 (a) of the 1934 law. Taxing provisions in

a later Act may not be applied to cover omission in an earlier Act. (*Smietanka v. First Trust & Savings Bank,* 257 U. S. 602.) As was pointed out in *Jones v. Helvering,* supra, in answer to a similar contention as that made here by the petitioner:

> "That the result of this was to enable the taxpayers to claim a deductible loss in their income and at the same time by reason of control of the corporation to retain an indirect interest in the bonds, undoubtedly is true, but *it is for the legislature and not the court to find a way of taxing such a transaction.*" (Italics supplied.)

In *Eaton v. White,* 70 Fed. (2d) 449, the Court adverted to *United States v. Merriam,* 263 U. S. 179, wherein the Court said:

> "On behalf of the government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

Continuing, and on page 452, the Court said:

> "These situations only emphasize the advisability and necessity of adhering to the well established rules and principles in dealing with legally established corporate entities and the status and character of corporate shares. *To abandon these moorings, would create difficulties and uncertain-*

ties more objectionable in their results than any seeming inequities which would be eliminated or prevented."

An exactly parallel situation arose under Revenue Acts prior to that of the Revenue Act of 1921. Congress for the first time included a provision in the Revenue Act of 1921 respecting "wash sales", providing that if a person sold a security at a loss and repurchased the same kind of security within thirty days thereafter, in such event the loss could not be taken for income tax purposes. Prior to the Revenue Act of 1921, there was no such provision and both the Commissioner and the Courts permitted a deductible loss to be taken in such circumstances, because of the fact that the statute created no exception to the general rule which recognized that upon the disposition of securities, a loss was realized, irrespective of whether the identical securities were repurchased the very next day.

Appeal of Pennsylvania Company for Insurance on Lives and Granting Annuities, 2 B. T. A. 48 (Acquiesced in by the Commissioner in C. B. IV-2, p. 4);

Vauclain v. Commissioner, 16 B. T. A. 1005.

Petitioner in his brief has cited a great many cases wherein the proposition is laid down that the separate entity of a corporation will be disregarded under exceptional circumstances. It would unduly lengthen this brief to analyze each of the cases cited by petitioner. Suffice it to say that the factual situation involved in each of such cases is so utterly different

from that involved herein that the cases have no application. That petitioner recognizes the inapplicability of the holding of those cases to the situation present here is clearly evidenced by his failure to state the facts in any of those cases or to compare them with the facts of the instant case.

Unquestionably, the Court can ignore the distinction between corporation and stockholder where the corporate structure is used as a device by which the stockholder is able to consummate a wrong. If respondent had used his control of the Burlingame Investment Company in order to make a sale to the corporation at a fictitious price and thereby create a fictitious loss, this Court could and would, as it did in the case of *Wishon-Watson Co. v. Commissioner,* 66 Fed. (2d) 52 (Petitioner's Brief, p. 15), hold the sale invalid. Or if respondent had organized the Burlingame Investment Company for the very and sole purpose of selling his securities to it at a loss and had, upon the completion of the sale, effected a dissolution of the corporation, this Court would be justified under the authority of *Gregory v. Helvering,* 293 U. S. 465 (Petitioner's Brief p. 14), in branding the transaction as a mere device for the evasion of income taxes.

The evidence here is undisputed, however, that Burlingame Investment Company was a bona fide corporation organized in 1924 to avoid multiple inheritance taxation, and for the legitimate purpose of dealing in securities, and that it transacted such business continuously from its incorporation in 1924 down to and including the time of the trial of this case in 1934;

that respondent sold the securities in question to the corporation at the market price of such securities at time of sale; that contemporaneously with the sale, the securities were transferred by respondent to the corporation and that continuously thereafter the corporation received and retained all benefits and income from the shares of stock acquired by it; that two of the securities were still held and owned by the corporation at date of trial, and that the third security had been sold by the corporation in the year 1932 on the open market and the proceeds of sale retained exclusively by the corporation; that in accordance with the uniform custom and practice between respondent and the corporation as to all transactions between them, including the payment of dividends, respondent received appropriate credit on the books of account of the corporation and on his separate books of account for the proceeds of sale; and that no agreement existed for the reacquisition by respondent of the securities sold to the corporation, nor did respondent reacquire any of such securities from the corporation.

It is highly significant to note that the only other sale from respondent to the Burlingame Investment Company was made in 1931, at which time respondent sold certain stock to the corporation at a substantial profit and reported this profit and paid a tax thereon in his federal income tax return for that year. (R. 70-72.) Clearly then, this is not the type of case where the sole stockholder of a corporation observes the distinction between himself and the corporation when it serves his own ends and ignores it when he finds it to his advantage to disregard the distinction. To the

contrary, we find that respondent has at all times meticulously treated the corporation as an entity separate and distinct from himself. The same cannot be said for the Commissioner. While entirely satisfied to accept the tax upon the 1931 transaction on the theory that a bona fide sale was made by respondent to the corporation at a profit, he nevertheless would have this Court disregard the corporate entity and hold that no bona fide sale was made in 1930 when the transaction resulted in a loss.

The petitioner admits that "the decision of this Court in *Commissioner v. Eldridge,* 79 F. (2d) 629, was on facts hardly distinguishable from those in the instant case and that the argument advanced on behalf of the Commissioner in the instant case is in all respects identical with that on behalf of the Commissioner in the *Eldridge* case". (Petitioner's Brief p. 26.) He argues, however, that "in the instant case the failure of the Board to make findings on the evidence before it which tended to prove a peculiar intertwining of the personal affairs of the respondent with the affairs of the corporation, and that they were in effect a single identity for all practical purposes, to be treated as such, has been assigned as error"—whereas in the *Eldridge* case, the failure of the Board to make such findings was not assigned as error.

It is difficult to follow the contention of petitioner in this regard. In the first place, the record does not show any request made by petitioner to the Board for any findings of fact. "If there were any specific questions of fact upon which defendant desired findings, it

should have presented them to the Court below". (*General Motors Co. v. Swan Carburetor Co.,* 44 Fed. (2d) 24, C. C. A. 6.) But even though we ignore the failure of the Commissioner to request the desired findings, the Commissioner gains no comfort thereby. The Board found that on December 30, 1930, respondent "unqualifiedly sold his said shares of stock of Standard Oil Company, Transamerica Corporation and Caterpillar Tractor Company to Burlingame Investment Company at the closing market quotations shown upon the San Francisco Stock Exchange on that date" (R. 29); that contemporaneously with the sale the certificates representing said shares of stock were transferred to the corporation; that separate individual books of account were kept by respondent from those of the corporation and appropriate entries were made on the books of account of respondent and the corporation evidencing the sales; that payment of the purchase price was made by appropriate credit on the books of account in line with the consistent practice for recording all transactions between respondent and the corporation, including payment of dividends; and that the sale of the shares of stock was bona fide. (R. 30, 31 and 33.)

If these ultimate findings of fact are supported by substantial evidence, they are conclusive upon an Appellate Court. (*Burnet v. Leininger,* 285 U. S. 136; *Phillips v. Commissioner,* 283 U. S. 589; *Commissioner v. Gerard,* 75 Fed. (2d) 542.)

That there is substantial evidence to support the foregoing findings appears clearly from the statement

of evidence. Aside from that, however, a comparison of the *facts in evidence* in the instant with the *facts found* in the *Eldridge* case shows that there was no greater degree of "intertwining" of personal affairs in one case than the other; the facts, in so far as material, were identical in both cases. Both corporations were "one-man" corporations. In each instance the corporation was a going business concern, the Eldridge Buick Company being engaged in the business of selling automobiles; the Burlingame Investment Company being engaged in the business of investing in securities. In both cases the sales in question were made at the close of the taxable year. In neither case did the vendor receive any cash from the corporation, the purchase price of the securities being credited in each case to the vendor's personal account with the corporation. In both cases the sale was made at the prevailing market price. In neither case was the transaction reflected in the minutes of the corporation.

In the plea which petitioner makes to this Court to disregard the corporate entity of the Burlingame Investment Company, petitioner states:

> "The relationship between the respondent and the corporation was not the usual relationship ordinarily existing between a stockholder and a corporation. The relationship was far closer and more intimate than such a relationship, and of such an unusual nature as to demand that the identity of the corporation as such be disregarded and that it be treated as the respondent's *alter ego.*"
>
> (Petitioner's Brief p. 9.)

Bearing in mind that respondent was the *sole* stockholder of the corporation, it is obvious that there was nothing in the least *unusual* in the relationship between the corporation and himself. Since no one other than respondent had a financial interest in the corporation, it was only *natural* that respondent should be president of the company; that respondent should be the sole person in charge of its active affairs; that he alone should supervise the keeping of the books of the company and that such books should be kept at the joint office of himself and the company; that only respondent should have authority to sign the corporation's checks; that he alone should direct the policy of the corporation. Who, if not the sole stockholder of the corporation, could reasonably be expected to exercise the functions of management and control of the corporate affairs?

The only question involved herein is whether an individual who sells securities owned by him to a corporation of which he is the sole stockholder, without any reservations as to title or future enjoyments, and at the prevailing market price of such securities, is deprived of his right to deduct as a loss in his income tax return, the difference between the cost of the securities to him and the price at which he sold them to the corporation, merely because he is the sole stockholder of the corporation. This question has been determined favorably to respondent by the United States Supreme Court in *Burnet v. Commonwealth Improvement Company,* supra, by this Court in *Commissioner v. Eldridge,* supra, and by every other judi-

cial forum to which it has been presented. The sales involved herein therefore resulted in a deductible loss to respondent.

CONCLUSION.

The decision of the Board of Tax Appeals is correct and should be affirmed.

Dated, San Francisco,
May 8, 1936.

Respectfully submitted,
JOHN C. ALTMAN,
Attorney for Respondent.

WILLARD L. ELLIS,
Of Counsel.

No.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
ONTARIO CANNING CO. INC., a corporation,
Debtor.

WEISSTEIN BROS. & SURVOL, a California corporation,
Appellant,

vs.

HUBERT F. LAUGHARN, Trustee in Bankruptcy of Ontario Canning Co. Inc., Debtor,
Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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United States of America, ss.

To HUBERT F. LAUGHARN, Trustee in Bankruptcy of Ontario Canning Co. Inc., Debtor Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 27th day of January, A. D. 1936, pursuant to an appeal duly obtained and filed on the 27th day of December, 1935, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain matter entitled "In the matter of Ontario Canning Co. Inc., a corporation, Debtor" wherein Weisstein Bros. & Survol, a California corporation is appellant and you are appellee to show cause, if any there be, why the order and decree in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEO. COSGRAVE United States District Judge for the Southern District of California, this 27th day of December, A. D. 1935, and of the Independence of the United States, the one hundred and Sixtieth

Geo Cosgrave
U. S. District Judge for the Southern District of California.

Due and personal service of the within Citation is hereby expressly admitted and acknowledged.

Los Angeles Cal; January 2nd, 1936

Hubert F. Laugharn,
Trustee for Ontario Canning Co. Inc. Debtor
Robt. B. Powell, Atty.

[Endorsed]: Filed Jan. 3, 1936 at 4:30 P. M. R. S. Zimmerman, Clerk By F. Betz, Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

IN THE MATTER OF ONTARIO CANNING CO. INC., a corporation, Debtor.	IN BANKRUPTCY NO. 24637-C AGREED STATEMENT OF THE CASE IN LIEU OF RECORD, PURSUANT TO EQUITY RULE 77.

The parties hereto, believing that the questions presented by the appeal herein from an order of the above entitled Court, dated November 30th, 1935, setting aside on review an order of the Referee in Bankruptcy of this Court, before whom the administration of the debtor estate is pending, can be determined by the United States Circuit Court of Appeals, for the Ninth Circuit, to which the said appeal has been taken and allowed, without an examination of all the pleadings and evidence, present this statement of the case pursuant to Equity Rule 77 showing how the questions arose and were decided in said District Court, and setting forth such of the facts alleged and proved or sought to be proved as are deemed essential to a decision of such questions by said United States Circuit Court of Appeals for the Ninth Circuit, as follows:

On December 15th, 1934, Ontario Canning Co. Inc. filed its debtor's petition in this Court and the same was approved by said Court. On January 13th, 1935, this

Court made an order authorizing the Trustee to dispose of the assets of said estate. The Trustee presented his petition for an order to confirm the sale, which petition was heard on the 4th day of February, 1935. The best bid obtainable was the sum of $3500.00 offered by the Oakland Packing Company in a written offer of purchase, part of which offer is as follows:

"* * * * * *

"2. All right, title and interest of the debtor estate in and to canned goods as follows:

"* * * * * *

"(c) 11,928 cases pledged to secure loan of approximately $17,995.79 and also to secure open account of $3,499.61 with the Security First National Trust and Savings Bank.

"* * * * * *"

At the hearing for the sale, claimant, Weisstein Bros. & Survol objected to such sale on the ground that 253 cases of berries offered for sale by the Trustee belonged to said claimant, and in order to perfect the sale, a stipulation between Weisstein Bros. & Survol and the Trustee was entered into, as follows:

(TITLE OF COURT AND CAUSE)

STIPULATION

"WHEREAS, Weisstein Bros., and Survol, hereinafter for convenience only referred to as the 'Claimant', contend:

"That on or about the 10th day of August, 1934, Claimant purchased from the debtor 353 cases of four

dozen cans each #IT Dell Valle Youngberries Fancy, totaling 1412 dozen, at a purchase price of 97 1/2¢ per dozen, and that Claimant paid the purchase price thereof in full and in cash, and that Claimant has at all times herein referred to been the owner of and entitled to the possession of said merchandise.

"That said merchandise, with the exception of 100 cases thereof which were subsequently delivered to Claimant, was not delivered to Claimant, but that 253 cases, or 1012 dozen, remained in the possession of the debtor.

"That said 253 cases came into the possession of the trustee herein or that the same were delivered by the debtor into the possession of a warehouse on the premises of the debtor, maintained and operated and in the possession of either the debtor or Lawrence Warehouse Company.

"That Claimant is the owner of and entitled to the possession of said 253 cases in whosever possession the same may be found and that the present market value thereof is One Thousand Three Hundred Sixty-Six Dollars and 20/100ths ($1,366.20); and

"WHEREAS, the trustee had effected a sale of all of the assets of the debtor, which sale trustee considered to be highly advantageous to the estate and which sale trustee was desirous of consummating; and

"WHEREAS, said Claimant, in consideration of the stipulation hereinafter stated, waived all objections which Claimant might have had to the confirmation of such sale by the above entitled Court on the 4th day of February, 1935.

"IT IS HEREBY STIPULATED that the trustee shall impound and keep in his possession out of the proceeds of the sale of the assets of the debtor, confirmed by the above entitled Court on the 4th day of February, 1935, in the sum of One Thousand Three Hundred Sixty-Six Dollars and 20/100ths ($1,366.20), and that said sum shall be used, disposed of and paid by the trustee in the following manner and for the following uses and purposes, and not otherwise:

"In the event Claimant shall establish that, as of the date of the filing of the petition herein, it was the owner of and entitled to the possession of 253 cases #IT Dell Valle Youngberries Fancy and that said merchandise came into the possession of the trustee or that said merchandise had been theretofore or thereafter placed in the field warehouse of the debtor, operated by the Lawrence Warehouse Company, and that the trustee or Claimant was entitled to recover possession thereof from or out of said field warehouse, then, and in either of such events, the trustee shall pay and deliver said sum to Claimant and such payment shall be and constitute full payment of any and all claims of said Claimant against said trustee, or said debtor.

"In the event Claimant shall fail to establish such title or right to possession, said sum shall be thereafter used as a part of the general assets of the estate and Claimant may thereupon file its claim herein in the usual course.

"The determination of the title and the right to possession of said merchandise shall be had by a hearing before the Honorable D. W. Richards, one of the referees in bankruptcy in the above entitled Court, or such other referee as the parties may agree upon in the event said

honorable referee is unavailable, as on a petition for reclamation, but without the necessity for the filing of any pleadings therein or thereon, it being intended that this stipulation shall fix and determine the issues to be tried at such hearing and that said referee shall hereby be authorized and empowered to try and determine said issues as a summary proceeding, subject, nevertheless, to review by the above entitled Court and to any other review or appeal allowed by law.

"Any action had or taken by the Claimant pursuant to this stipulation shall not prejudice nor affect the Claimant's rights and remedies against any other person other than the trustee and the above entitled estate.

"The foregoing stipulation is entered into pursuant to the approval thereof given by the Honorable George Cosgrave, Judge of the above entitled Court, in open Court the 4th day of February, 1935.

"Dated: February 13, 1935.

ROBERT B. POWELL
Attorneys for Trustee.

JULES C. GOLDSTONE
Attorneys for Claimant."

Thereafter, on April 18th, 1935, a hearing was had before Honorable D. W. Richards, a Referee in Bankruptcy, to determine and decree the rights of the parties under said stipulation. After taking testimony, the Referee made his written opinion and order, as follows:

(TITLE OF COURT AND CAUSE)

"REFEREE'S OPINION.

"The above-entitled matter came on for hearing on April 18, 1935, Robert B. Powell and William J. Heffran appearing for the Trustee, Hubert F. Laugharn; David A. (Hasandel) Sondel and Jules C. Goldstone appearing as counsel for Weisstein Brothers and Survol; and the Security First National Bank of Los Angeles and J. J. Sugarman appearing specially by Chester E. Cleveland, Jr., and the Lawrence Warehouse Company appearing specially by their counsel, Frank M. Barry.

"Counsel for the Lawrence Warehouse Company and the Security-First National Bank of Los Angeles, and J. J. Sugarman, having appeared specially and objected to the jurisdiction of the Referee to hear said matter, IT IS HEREBY ORDERED that said objection as to the jurisdiction of the Referee is a good and valid objection, and is, therefore, sustained.

"The meeting then proceeded to hearing claim of Weisstein Brothers and Survol, on behalf of Hubert F. Laugharn as Trustee of the Bankrupt Estate and Weisstein Bros. and Survol by their counsel, and evidence both oral and documentary having been submitted, the Referee is of the opinion that under and pursuant to the stipulation dated February 13, 1935, between Robert B. Powell, as attorney for the Trustee, and Jules C. Goldstone, attorney for Weisstein Brothers and Survol, the claimant, that said claim has established that as of the date of filing the petition it was the owner of and entitled to the possession of 253 No. IT. Dell Valle Youngberries, fancy, and that said merchandise had been placed in a field warehouse by

the debtor, operated by the Lawrence Warehouse Company, and that claimant was entitled to recover possession thereof from the said field warehouse, and that the Trustee should pay to Weisstein Brothers and Survol such sums as will constitute full payment of any and all claims, to wit, the sum of $1366.20, and IT IS SO ORDERED.

"Dated June 11, 1935.

D. W. RICHARDS
Referee in Bankruptcy."

The said order was reviewed by this Court on petition of the Trustee and this Court made its order and decree setting aside and reversing the order of the Referee, this Court having rendered its written opinion, as follows:

(TITLE OF COURT AND CAUSE)

"Memorandum of Decision."

"COSGRAVE, District Judge.

"In August, 1934, at the time when claimant bought the berries, they were in a warehouse where they had been previously placed by the bankrupt as a pledge to the Security First National Bank for money advanced. The bank asserted its rights under this pledge, which apparently it had a right to do, and sold the goods, applying the proceeds on its indebtedness of the bankrupt. So far as the Ontario Canning Co. and claimant are concerned the latter had bought and paid for the goods and title had passed. The bankrupt, however, was unable to deliver because of the situation just described. What is the remedy of the claimant in such a case? Were the goods available, undoubtedly the claimant would be enti-

tled to delivery. In default of such relief, however, it seems to me it has only a demand for money as a general creditor.

"Claimant is not aided by the stipulation. Plainly there was no right of possession in the claimant because of the previous pledge to the bank. In any event such right could not be litigated except where the bank is a party.

"Petition of the trustee for review is therefore granted and the trustee will present an order in accordance with this memorandum.

"Exception to claimants.

October 8, 1935."

The essential facts are as follows:

Claimant operated a retail grocery business in the City of Los Angeles. In August, 1934, it purchased from the Ontario Canning Co. Inc. 353 cases of berries for the sum of $1342.29. Claimant received an invoice for such items and in such amount, and issued its check in full payment, payable to the order of the Security-First National Trust and Savings Bank upon a draft drawn on the buyer by said seller. Thereafter, installment deliveries of some of the berries were made to the claimant, and an aggregate amount of 100 cases was received by claimant, but claimant has never received the balance of 253 cases, although the claimant demanded possession but was unable to procure the release, surrender or delivery of said 253 cases.

These berries, along with other stock of the Ontario Canning Co. Inc. had been previously pledged by said canning company to the Security-First National Trust and Savings Bank to secure an indebtedness to said bank

and such merchandise had been deposited by the canning company with the Lawrence Warehouse Company under such pledge. The warehouse company had opened a warehouse in a part of the same building used by the canning company, but the canning company exercised no dominion or control over the part of the building occupied by the warehouse company. The bank and the canning company had made arrrangements between themselves of the conditions upon which merchandise so pledged might be released. The claimant had no knowledge of the existence of said pledge agreement and had no knowledge of any arrangements between the bank and the canning company, and had procured the delivery of the first 100 cases without any delay or difficulty. The 253 cases had been stacked in the warehouse and each stack was marked with a card bearing the words "Sold to Weisstein Bros. & Survol".

The claimant offered the testimony of its officer and of the president of the canning company and the debtor presented no testimony. The proofs showed that the failure of the canning company to release the merchandise and its inability to surrender and deliver such merchandise to the claimant was not because of any arrangement between the canning company and the claimant but was due solely to the transactions between the canning company and such bank, and the claimant had no knowledge prior to the filing of the canning company's petition under Section 77B of the Bankruptcy Act of any arrangements between such canning company and the bank respecting the release of any merchandise.

After this Court made its order and decree, and within the time and in the form and manner provided by law, the claimant perfected its appeal from said order of the

District Court made on November 30th, 1935 and entered on December 3rd, 1935, to the United States Circuit Court of Appeals, for the Ninth Circuit, such appeal having been allowed by this Court, a Citation having beeen issued after appellant had filed its Petition for the allowance of the appeal, together with its Assignment of Errors.

IT IS HEREBY STIPULATED AND AGREED that the foregoing agreed statement of the case is true and correct and that all of the facts therein stated concerning the record may be regarded as true by the United States Circuit Court of Appeals, for the Ninth Circuit and shall be taken and deemed by the Court as made pursuant to Equity Rule 77.

DATED this 21 day of January, 1936.

Jules C. Goldstone
And David A. Sondel
Attorneys for Appellant and Claimant.
Robert B. Powell
Attorney for Hubert F. Laugharn as Trustee of
Ontario Canning Co. Inc., Debtor.

The foregoing agreed statement of the case is hereby approved, and

IT IS ORDERED that such statement be filed with the Clerk of the above entitled Court and that a certified copy thereof be filed with the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

DATED this 22nd day of January, 1936.

Geo. Cosgrave
United States District Judge

(TITLE OF COURT AND CAUSE)

STIPULATION FOR CONTENTS OF RECORD ON APPEAL.

IT IS HEREBY STIPULATED by and between the parties hereto that the Clerk of the Court in making up the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, from an order of this Court made on November 30th, 1935, reversing the order of the Referee in Bankruptcy directing the full payment of $1366.20 to the claimant, Weisstein Bros. & Survol, shall include the following papers only:

1. Agreed statement of the case;
2. The order of the Court made November 30th, 1935;
3. Petition for appeal and order allowing same;
4. Assignment of errors;
5. Citation on appeal.

IT IS FURTHER STIPULATED that the whole title of the Court and Cause shall be omitted except in connection with the agreed statement of the case, and shall be referred to only as "Title of Court and Cause".

DATED this 21 day of January, 1936.

Jules C. Goldstone
And David A. Sondel
Attorneys for Appellant and Claimant.
Robert B. Powell
Attorney for Hubert F. Laugharn, Trustee of Ontario Canning Co. Inc. Debtor.

[Endorsed]: Filed R. Z. Zimmerman, Clerk at 56 min. past 12 o'clock, Jan. 22, 1936 P. M. By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

ORDER.

A stipulation having heretofore been entered by and between Hubert F. Laugharn, Trustee of the above entitled estate and Weinstein Brothers and Survol, claimants, through their respective attorneys; and an order to show cause having duly issued out of this Court and having come on for hearing before D. W. Richards, Referee in Bankruptcy, the said D. W. Richards, Referee in Bankruptcy having filed his order herein that under the terms of said stipulation the said claimants, Weinstein Brothers and Survol were entitled to be paid by Hubert F. Laugharn, Trustee of the above entitled estate the principal sum of $1,366.20; and the said Hubert F. Laugharn, Trustee, having filed his Petition for Review of said order, and the matter having duly come on before this Court on September 23, 1935 at the hour of 2 P. M. thereof, and the said parties having orally appeared before this Court through their respective attorneys; and written memoranda having been filed by the said respective parties; and the Court being fully advised in the premises, the Court hereby makes the following order:

IT IS HEREBY ORDERED that the Petition for Review heretofore filed by Hubert F. Laugharn be, and the same hereby is, granted, and the order heretofore entered in the above entitled matter and signed by D. W. Richards, Referee in Bankruptcy, is hereby set aside and annulled.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Weinstein Brothers and Survol are general creditors of this estate in the principal sum of $962.04.

DATED: this 30th day of November, 1935.

Geo. Cosgrave
Judge of the District Court

Approved as to form as required by Rule 44.

Robert B. Powell

[Endorsed]: Filed R. S. Zimmerman, Clerk at 16 min. past 12 o'clock Dec. 3, 1935 P. M. By L. Wayne Thomas, Deputy Clerk.

[Title of Court and Cause.]

PETITION FOR APPEAL.

The undersigned Weisstein Bros. & Survol, a California corporation, conceiving itself aggrieved by the written order of this Court, made on the 30th day of November, 1935, and entered on the 3rd day of December, 1935, wherein this Court reversed, set aside and annulled an order theretofore made on June 11th, 1935 by Honorable D. W. Richards, Referee in Bankruptcy in the above entitled matter, which said order of Honorable D. W. Richards as Referee in said bankruptcy estate determined, ordered and decreed that the undersigned was entitled to receive and recover from the Trustee in said bankrupt estate the sum of $1366.20 in cash and wherein by said order of the Referee, the Trustee of said bankruptcy estate was ordered and directed to pay such sum of $1366.20 in cash to the undersigned, and whereby the order of this Court made on said 30th day of November, 1935, adjudged and decreed that the undersigned is not entitled to the receipt of such or any sum in cash but is only a general creditor of said bankrupt estate in the principal sum of $962.04 and not otherwise, does hereby petition this Court for an appeal from said order and decree to the United States Circuit Court of Appeals, for the Ninth Circuit and prays that its appeal may be allowed and that citation issue as provided by law directed to Hubert F. Laugharn, Truestee of the above bankruptcy, demanding him to appear before the United States Circuit Court of

Appeals for the Ninth Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said proceedings and cause, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said Court in such causes made and provided, and that the amount of the cost bond to be filed by your petitioner be determined.

DATED: In the Southern District of California, Central Division, this 23rd day of December, 1935.

WEISSTEIN BROS. & SURVOL,
a California corporation,

By Morris Weisstein, Pres.
Petitioner.

Jules C. Goldstone
David A. Sondel
Attorneys for Petitioner.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 13 min. past 1 o'clock Dec. 27, 1935 P. M. By L. B. Figg Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT,
IN AND FOR THE SOUTHERN DISTRICT
OF CALIFORNIA CENTRAL
DIVISION.

--oOo--

IN THE MATTER OF ONTARIO CANNING CO. INC., a corporation, Debtor.	))))	IN BANKRUPTCY NO. 24637-C ASSIGNMENT OF ERRORS.

NOW COMES Weisstein Bros. & Survol, a California corporation and files the following Assignment of Errors on appeal from the order of the District Court of the United States, for the Southern District of California, Central Division, dated November 30th, 1935, and entered on the 3rd day of December, 1935:

FIRST ASSIGNMENT OF ERROR.

Said Court erred in reversing, annulling, setting aside and in any manner disturbing the order of the Referee in Bankruptcy, which order of the Referee bears date June 11th, 1935, and by which order of the Referee, the Trustee of the above bankrupt estate was ordered and directed to pay to the appellant and claimant herein, Weisstein Bros. & Survol, a corporation, the sum of $1366.20 in cash, out of the cash assets of said estate.

SECOND ASSIGNMENT OF ERROR.

Said Court erred in reversing, setting aside, annulling and in any manner disturbing the order of the Referee in Bankruptcy in said matter wherein by said order of

the Referee dated June 11th, 1935, it was found and determined that the undersigned appellant and claimant, Weisstein Bros. & Survol, a corporation, was entitled to have, recover and receive of and from the Trustee of said bankrupt estate the sum of $1366.20 out of the cash assets of said estate.

THIRD ASSIGNMENT OF ERROR.

Said Court erred in making its order dated November 30th, 1935 and entered on the 3rd day of December, 1935, wherein by said order it was adjudged and decreed that the undersigned appellant and claimant, Weisstein Bros. & Survol is a general creditor of said bankrupt estate in the sum of $962.04.

WHEREFORE, it is prayed that the order of the United States District Court, for the Southern District of California, Central Division, heretofore referred to may be reversed and set aside, and that the order of the Referee in Bankruptcy directing and declaring that the undersigned appellant and claimant, Weisstein Bros. & Survol is entitled to the sum of $1366.20 in cash to be paid to it by the Trustee of said bankrupt estate out of assets therein existing, be affirmed, reinstated, and allowed and that the same be given full force and effect, and for such other and further relief as may seem meet and proper to the Court.

WEISSTEIN BROS. & SURVOL,
a California corporation,
By Jules C. Goldstone
And David A. Sondel
Its Attorneys.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 13 min. past 1 o'clock Dec. 27, 1935 P. M. By L. B. Figg, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ORDER

Upon reading and filing the petition of Weisstein Bros. & Survol, a California corporation, for an appeal from a written order of this Court, dated November 30th, 1935, and entered on the 3rd day of December, 1935, to the United States Circuit Court of Appeals for the Ninth Circuit, and upon the filing of its Assignment of Errors with the Clerk of this Court, and upon application of counsel for said petitioner, and good cause appearing therefor,

IT IS HEREBY ORDERED that Weisstein Bros. & Survol, a California corporation, be and it is hereby allowed and permitted to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the written order of this Court, dated November 30th, 1935, and entered on the 3rd day of December, 1935.

IT IS FURTHER ORDERED that citation issue as provided by law, directed to Hubert F. Laugharn as Trustee of Ontario Canning Co. Inc., a corporation, debtor, demanding him to appear before the United States Circuit Court of Appeals for the Ninth Circuit to show cause, if any there be, why the said order and decree should not be corrected and why speedy justice should not be done to the parties in that behalf.

IT IS FURTHER ORDERED that a transcript of the record and proceedings in such cause pertaining to the

petition for order to show cause and order based thereon respecting the claim and demand of Weisstein Bros. & Survol, a corporation, for the payment to it by the Trustee in Bankruptcy of the sum of $1366.20 in cash, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said Court in such cases made and provided.

IT IS FURTHER ORDERED that petitioner file cost bond it the amount of $250.00.

DATED: Los Angeles, California, Southern District of California, Central Division, this 27 day of December, 1935.

Geo Cosgrave
UNITED STATES DISTRICT JUDGE,
SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

[Endorsed]: Filed R. S. Zimmerman, Clerk at 43 min. past 1 o'clock Dec. 27 1935 P. M. By L. B. Figg, Deputy Clerk.

[Title of Court and Cause.]

Cost Bond

KNOW ALL MEN BY THESE PRESENTS, That we, Weisstein Bros. and Survol, a California corporation, (hereinafter called Appellant), as Principal and the Fidelity and Deposit Company of Maryland, a corporation, as Surety, are held and firmly bound in the sum of Two hundred fifty and no/100 ($250.00) Dollars, lawful money of the United States of America, to be paid to the Debtor as above captioned, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and successors, jointly and severally, firmly by these presents.

WHEREAS, the above named Claimant has appealed or is about to appeal, to the United States Circuit Court of Appeals for the Ninth *District,* from an order entered December 3rd, 1935, setting aside and annulling an order made June 11th, 1935, by the Honorable D. W. Richards, Referee in Bankruptcy, recognizing Weisstein Bros. and Survol, a California corporation, as a preferred creditor,

NOW, THEREFORE, in consideration of said appeal and of the premises, if the Appellant, the said Weisstein Bros. and Survol, a California corporation, Claimant above named, shall prosecute its writ on appeal to effect,

and answer all costs if it fails to make its plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

Signed and sealed this 26th day of December, 1935.

WEISSTEIN BROS. AND SURVOL
By Morris Weisstein, Pres.

FIDELITY AND DEPOSITY COMPANY OF MARYLAND
By W. H. Cantwell
(W. H. Cantwell)
Attorney in Fact

Attest Theresa Fitzgibbons
[Seal] (Theresa Fitzgibbons)
Agent

STATE OF CALIFORNIA)
) ss:
County of Los Angeles)

On this 26th day of December, 1935, before me S. M. Smith, a Notary Public, in and for the County and State aforesaid, duly commissioned and sworn, personally appeared W. H. Cantwell and Theresa Fitzgibbons known to me to be the persons whose names are subscribed to the foregoing instrument as the Attorney-in-Fact and Agent

respectively of the Fidelity and Deposit Company of Maryland, and acknowledged to me that they subscribed the name of Fidelity and Deposit Company of Maryland thereto as Principal and their own names as Attorney-in-Fact and Agent, respectively.

[Seal] S. M. Smith

Notary Public in and for the State of California, County of Los Angeles.

My Commission Expires February 18, 1938

Examined and recommended for approval as provided in Rule 28.

Jules C. Goldstone
David A. Sondel
Attorneys

Approved this 27th day of December, 1935

Geo. Cosgrave
District Judge

[Endorsed]: Filed R. S. Zimmerman, Clerk at 43 min past 1 o'clock Dec 27, 1935 P. M. By L. B. Figg, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 24 pages, numbered from 1 to 24 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; agreed statement of the case; order of the court made November 30th, 1935; petition for appeal; assignment of errors; order allowing appeal, and cost bond.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-six, and of our Independence the One Hundred and Sixtieth.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 8120.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

/3

In the Matter of
ONTARIO CANNING CO., INC.,
a corporation,
Debtor.

Weisstein Bros. & Survol, a California corporation,
Appellant,
vs.
Hubert F. Laugharn, Trustee in Bankruptcy of Ontario Canning Co., Inc., Debtor,
Appellee.

APPELLANT'S OPENING BRIEF.

JULES C. GOLDSTONE and
DAVID A. SONDEL,
Van Nuys Bldg., 210 W. 7th St., Los Angeles,
Solicitors and Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 8120.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of
ONTARIO CANNING CO., INC.,
a corporation,
Debtor.

Weisstein Bros. & Survol, a California corporation,
Appellant,

vs.

Hubert F. Laugharn, Trustee in Bankruptcy of Ontario Canning Co., Inc., Debtor,
Appellee.

APPELLANT'S OPENING BRIEF.

THE QUESTION FOR DECISION.

Where the evidence introduced at a hearing before a Referee in Bankruptcy supports the Referee's findings, decision and order, is it not error for the District Court on review to reverse the decision and order of the Referee?

STATEMENT OF THE CASE.

This appeal is presented upon an agreed statement of the case, pursuant to Equity Rule Number 77.

The pertinent matter under consideration is comprehended within the following facts:

Appellant operated a retail grocery store in Los Angeles. The Ontario Canning Co. operated a canning business. In August, 1934, appellant purchased 353 cases of berries from the Canning Company, paying the full purchase price therefore at the time of the purchase, and it was agreed that the berries would be delivered to the buyer at such times and in such amounts as would meet the convenience or requirements of the buyer.

At and prior to the time of such purchase, the Canning Company operated its business in a certain building in which the Lawrence Warehouse Company was also a tenant, and the finished products of the Canning Company were stored in the portion of the building occupied by the Warehouse Company.

From time to time, according to appellant's requirements, it called for and received some of the cases of berries so purchased and received in installment deliveries an aggregate of 100 cases, the balance of 253 cases remaining in the warehouse in stacks, each stack being marked with a card bearing the words "Sold to Weisstein Bros. & Survol".

After claimant obtained the delivery of 100 cases, it called for and demanded the balance of 253 cases, but claimant was unable to obtain possession of or procure the release or surrender of any of said 253 cases.

At the time of said purchase, claimant had no information respecting any arrangements between the Canning Company and the Warehouse Company and had no information respecting any arrangements between the Canning Company and its bank. Without the knowledge of claimant, all of the stock of the Canning Company had been previously pledged by the Canning Company to its bank, and the merchandise had been deposited in the warehouse by the Canning Company under such pledge.

After the sale to claimant and after the delivery of 100 cases to claimant, the Canning Company filed its petition under 77-B of the Bankruptcy Act, and subsequent to such filing, claimant was advised of the pledge arrangement above recited.

In the course of the administration of the bankrupt estate, the Trustee offered the assets of said estate (including its interest in the canned goods), for sale, whereupon claimant objected to the sale, maintaining that the 253 cases of berries were the property of claimant under its purchase and payment,—and as a result of claimant's objections and in order to permit the Trustee to complete its sale of the assets of the bankrupt estate without further opposition, a stipulation was made between the Trustee and the claimant [pages 4 to 7 of the Record], the substance of which was that if the claimant could establish at a hearing before a Referee in Bankruptcy that at the date of the filing of the bankruptcy petition claimant was the

owner and entitled to the possession of the 253 cases of berries, and that said merchandise came into the possession of the Trustee or that said merchandise had been theretofore or thereafter placed in the warehouse operated by the Lawrence Warehouse Company, and that the Trustee or claimant was entitled to recover possession, then and in either of such events, the Trustee would pay to the claimant out of the proceeds of the sale of the assets of the debtor, in full payment of the claimant's demands against the Canning Company and its Trustee, the sum of $1366.20 in cash, such sum being the agreed then value of the 253 cases, such sum of $1366.20 to be impounded pending the determination of the matter by the Referee.

Thereafter, a hearing was had before the Referee at which claimant introduced evidence, oral and documentary, establishing without controversy, conflict or dispute, its purchase of said berries, its payment therefor, and its right to the possession thereof; and the debtor corporation presented no testimony in opposition. The proofs further show that the failure of the Canning Company to release the 253 cases and its inability to surrender said 253 cases to claimant, were not due to any fault of the claimant or any arrangement between the Canning Company and the claimant,—but were due solely to the nature of the private transactions between the Canning Company and the bank, of which the claimant had no knowledge.

After such hearing, the Referee made his written findings and decision [pages 8 and 9 of the Record], expressly finding that the claimant established that as of the date of the filing of the debtor's petition in bankruptcy, claimant was the owner of and entitled to the possession of the 253 cases of berries, that said merchandise had been placed by the debtor in a warehouse operated by the Lawrance Warehouse Company and that claimant was entitled to recover possession thereof; and the Referee thereupon ordered the payment to claimant of the impounded sum of $1366.20.

Upon a hearing, based upon a petition for review prosecuted by the bankrupt, the District Court reversed the order of the Referee [pages 9 and 10 of the Record], and made an order [pages 14 and 15 of the Record] setting aside and annulling the order of the Referee, and allowed the claimant a general claim for $962.04.

ASSIGNMENT OF ERRORS.

At pages 18 and 19 of the Record, the appellant's Assignment of Errors is set forth in full. The three assignments are:

"First Assignment of Error.

"Said Court erred in reversing, annulling, setting aside and in any manner disturbing the order of the Referee in Bankruptcy, which order of the Referee bears date June 11th, 1935, and by which order of the Referee, the Trustee of the above bankrupt estate

was ordered and directed to pay to the appellant and claimant herein, Weisstein Bros. & Survol, a corporation, the sum of $1366.20 in cash, out of the cash assets of said estate.

"Second Assignment of Error.

"Said Court erred in reversing, setting aside, annulling and in any manner disturbing the order of the Referee in Bankruptcy in said matter wherein by said order of the Referee dated June 11th, 1935, it was found and determined that the undersigned appellant and claimant, Weisstein Bros. & Survol, a corporation, was entitled to have, recover and receive of and from the Trustee of said bankrupt estate the sum of $1366.20 out of the cash assets of said estate.

"Third Assignment of Error.

"Said Court erred in making its order dated November 30th, 1935, and entered on the 3rd day of December, 1935, wherein by said order it was adjudged and decreed that the undersigned appellant and claimant, Weisstein Bros. & Survol, is a general creditor of said bankrupt estate in the sum of $962.04."

APPELLANT'S CONTENTIONS.

Appellant respectfully maintains that on the record there was no basis upon which the District Court could disturb the Referee's decision and order; and that the District Court committed reversible error in annulling and setting aside the order of the Referee.

ARGUMENT.

(1) The Law.

Appellant submits that inasmuch as the decision of the Referee was predicated upon ample and sufficient evidence to sustain and justify the decision and order, the Referee's order should not have been disturbed by the District Court; and that accepting the applicable rule that the Referee's order is to have the presumption of correctness in its favor and that the Referee's findings are to have the same presumption, and that only manifest error will justify reversal on the facts, the District Court committed error in annulling such order of the Referee.

Gordon v. Gelberg, 69 F. (2d) 81, at p. 83 (1); C. C. A. 2nd;

Rasmussen v. Gresly, 77 F. (2d) 252; C. C. A. 8th;

Remington on Bankruptcy, 4th Edition, Volume 8, Section 3669, page 41.

In *Rasmussen v. Gresley* (*supra*), the Court said:

> "The determination of a referee in bankruptcy of issues of fact, based upon the evidence of witnesses appearing in person before him, where such determination must rest upon the credibility of the witnesses and the weight of their evidence, should ordinarily be accepted upon review, except in those cases where it is obvious that the referee has made a mistake."

(2) Analysis of District Court's Decision.

[Pages 9 and 10 of the Record.]

The District Court expressly found that as between the claimant and the Canning Company, claimant "had bought and paid for the goods and title passed". It is appellant's claim that these were the precise matters to be determined under the stipulation, and that the findings on these points in claimant's favor necessarily impelled a decision favorable to appellant. The very purpose of the stipulation was to obtain a judicial determination of those very facts, for the precise purpose of determining *who, as between the bankrupt estate and claimant*, was entitled to receive the impounded sum of $1366.20.

After finding entirely in favor of appellant on the facts, the District Court concluded "claimant is not aided by the stipulation", entirely failing to recognize that the *existence* of the facts in appellant's favor *entitled appellant* to the impounded funds *under the stipulation*. The District Court explained the last quoted statement by stating that the question of the right of possession "could not be litigated except where the bank is a party"—but the District Court thereby failed to recognize the fact that the Trustee and claimant had voluntarily stipulated *between themselves* the manner in which the right to the impounded funds should be determined—and inasmuch as the stipulation had the express approval of the District Court ("The foregoing stipulation is entered into pursuant to the approval thereof given by the Honorable George Cosgrave,

Judge" [page 7 of the Record]), the parties had the right to stipulate the manner in which the question should be determined, and the stipulation expressly provides for the determination of such question *at a hearing between the parties* to the stipulation; and this fact is borne out by the Referee's decision which recites: "The meeting then proceeded to hearing claim of Weisstein Bros. & Survol, on behalf of Hubert F. Laugharn as Trustee of the bankrupt estate and Weisstein Bros. & Survol by their counsel, and evidence both oral and documentary having been submitted" [page 8 of the Record].

Manifestly, the claimant having paid for 353 cases of berries, and having received 100 cases, was entitled to "the right of possession" of the 253 cases as effectively as it was entitled to "the right of possession" of the 100 cases delivered to and received by it.

As illustrative further of the patent error of the District Court, notwithstanding the fact that the stipulation fixed the value of the 253 cases at $1366.20 and notwithstanding the fact that no evidence of any kind was offered at the hearing to repudiate such values or to fix any other value, the District Court *in the total absence of any basis for its act,* fixed the value of the 253 cases at $962.04. This matter is covered by appellant's third assignment of error and it is specifically called to this Honorable Court's attention at this time, *not* for the purpose of establishing appellant's claim as a *general* creditor in any amount, but for the limited purpose of indicating the lack of justification or basis for the disturbance of the Referee's decision.

Conclusion.

Appellant respectfully submits that the decision and order of the Referee should be reinstated and restored; that it should be decreed that appellant is entitled to the sum of $1366.20 in cash; and that the order of the District Court should be reversed.

Respectfully submitted:

JULES C. GOLDSTONE and
DAVID A. SONDEL,
Solicitors and Attorneys for Appellant.

No. 8120

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

Ontario Canning Co., Inc., a corporation,

Debtor.

Weisstein Bros. & Survol, a California corporation,

Appellant,

vs.

Hubert F. Laugharn, Trustee in Bankruptcy of Ontario Canning Co., Inc., Debtor,

Appellee.

REPLY BRIEF OF APPELLEE.

ROBERT B. POWELL,
633 Subway Terminal Bldg., Los Angeles, Cal.
Solicitor and Attorney for Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 8120

In the United States Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of

Ontario Canning Co., Inc., a corporation,

Debtor.

Weisstein Bros. & Survol, a California corporation,

Appellant,

vs.

Hubert F. Laugharn, Trustee in Bankruptcy of Ontario Canning Co., Inc., Debtor,

Appellee.

REPLY BRIEF OF APPELLEE.

QUESTION FOR DECISION.

Is the appellant entitled to the sum of $1,366.20 under the terms of the stipulation, or is it a general creditor of this debtor estate in the sum of $962.04?

STATEMENT OF THE CASE.

The Trustee does not find particular fault with the statement of the case as made by appellant, but believes that it should be more particularly pointed out that the Lawrence Warehouse Company was a separate and individual concern and had no connection with the debtor, Ontario Canning Co., Inc., and that the debtor exercised no control or dominion over the Lawrence Warehouse Company, and further that under the terms of the pledge agreement between the Security-First National Bank of Los Angeles, and the debtor, Ontario Canning Co., Inc., the Lawrence Warehouse Company was the agent of the Security-First National Bank of Los Angeles, and thus, had control of the merchandise involved in this appeal.

It should be further borne in mind that the Trustee only sold all of the right, title and interest of the debtor estate in and to this merchandise and other merchandise which had been previously pledged to the Security-First National Bank of Los Angeles.

ARGUMENT.

There can be no doubt that as between the debtor and the appellant, Weisstein Bros. & Survol, there was a sale of the particular merchandise. It is also undisputed that the merchandise had been paid for and that only 100 cases of the youngberries had been delivered to the appellant, and that as between appellant and the debtor, appellant was entitled to delivery of 253 cases if there had been no previous pledge to the Security-First National Bank of Los Angeles.

Under the terms of the stipulation, it became necessary in order for the appellant to become entitled to the sum of $1,366.20 that it be shown that the merchandise "came into the possession of the Trustee, or that said merchandise had been theretofore or thereafter placed in the Field Warehouse of the debtor operated by the Lawrence Warehouse Company, and that the *Trustee or claimant was entitled to recover possession from or out of the Field Warehouse.*" Quite obviously, the Trustee did not come into possession of the merchandise because it was held under the terms of the pledge with the Security-First National Bank of Los Angeles, and this pledge agreement has not been attacked by appellant.

The records of this proceeding reflect that the Security-First National Bank of Los Angeles and the Lawrence Warehouse Company appeared at the hearing before the Referee and objected to the jurisdiction of the Bankruptcy Court, and that this objection was sustained by the Referee. (See Certificate by Referee to Judges upon review.)

It becomes quite apparent that upon December 15, 1934, the date the debtor's petition was filed herein, that the merchandise involved in this appeal was not in the possession of the debtor and that thereafter it did not come into the possession of the Trustee because it was held by the Lawrence Warehouse Company for the benefit of the Security-First National Bank under the terms of the pledge agreement. This being so, the appellant is relegated to the position of a general creditor of this estate. The District Court upon review of the Referee's order determined that the original purchase price of the merchandise involved herein was $1,342.29 and that the cost price of the remaining 253 cases of merchandise which

had been paid totalled the sum of $962.04, and therefore held that appellant was a general creditor against this debtor estate in said amount. It can be undisputed that the District Court had the right to review the records and files of this proceeding in order to determine the correct and proper amount of appellant's claim, and the conclusions of the Referee are in no sense binding upon the Court. The Court is just as able to indulge in inferences from the testimony produced as is the Referee.

In the Matter of George B. McClelland, Bankrupt. (District Court, Southern District of California.) 275 Fed. 576.

Conclusion.

The Trustee respectfully submits the decision and order of the District Court should be affirmed, and that it should be decreed that appellant is a general creditor of the debtor estate in the sum of $962.04, and no other sum.

Respectfully submitted,

ROBERT B. POWELL,
Solicitor and Attorney for Appellee.

No. 8122

United States

Circuit Court of Appeals

For the Ninth Circuit.

15

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BERKELEY HALL SCHOOL, INC.,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States Board of Tax Appeals.

Parker Printing Co., 545 Sansome Street, San Francisco 60—3-10-36

No. 8122

United States

Circuit Court of Appeals

For the Ninth Circuit.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

BERKELEY HALL SCHOOL, INC.,
Respondent.

Transcript of the Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES:

For Petitioner:

CLAUDE I. PARKER, Esq.,
JOHN B. MILLIKEN, Esq.,
RALPH W. SMITH, Esq.,
L. A. LUCE, Esq.,
GIRARD F. BAKER, Esq.,

For Respondent:

C. H. CURL, Esq.

Docket No. 47415.

BERKELEY HALL SCHOOL, INC.,
a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES:

1930

Feb. 10—Petition received and filed. Taxpayer notified. (Fee paid).

Feb. 11—Copy of petition served on General Counsel.

Mar. 29—Answer filed by General Counsel.

Apr. 1—Copy of answer served on taxpayer—General Calendar.

1930

May 14—Order placing proceeding on Los Angeles, California, Circuit Calendar, entered.

July 18—Notice of appearance of John B. Milliken as counsel for taxpayer filed.

1931

July 25—Motion to file amendment to answer filed by General Counsel—amendment tendered.

July 28—Motion granted.

Sept. 4—Reply to amendment to answer filed by taxpayer. 9/8/31 copy served on General Counsel.

1933

July 12—Hearing set in Long Beach, Calif., beginning Sept. 25, 1933.

Sept. 26 & 27—Hearing had before Mr. Leech on merits—submitted. Amendment to petition and appearances of Girard F. Baker and Ralph W. Smith filed. Briefs due Nov. 24, 1933.

Oct. 11—Transcript of hearing of Sept. 26 and 27, 1933 filed.

Nov. 23—Brief filed by General Counsel.

Dec. 1—Motion for extension of time to Jan. 1, 1934 to file brief filed by taxpayer. 12/1/33 granted to Dec. 15, 1933 to both parties.

Dec. 15—Motion for five days extension to file brief filed by taxpayer. 12/19/33 granted.

Dec. 16—Brief filed by taxpayer.

1935

Jan. 24—Findings of fact and opinion rendered—J. Russell Leech, Division 6. Decision will be entered for the petitioner.

Jan. 31—Decision entered—J. Russell Leech, Division 6.

Apr. 13—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by General Counsel.

Apr. 22—Proof of service filed by General Counsel.

June 4—Motion for extension to Aug. 13, 1935 to complete and transmit record filed by General Counsel. [1*]

June 4—Order enlarging time to Aug. 13, 1935 for preparation of evidence and delivery of record entered.

Aug. 5—Motion for extension to Oct. 14, 1935 to complete and transmit record filed by General Counsel.

Aug. 5—Order enlarging time to Oct. 14, 1935 to complete and transmit record entered.

Oct. 9—Motion for extension to 12/14/35 to complete and transmit record filed by General Counsel.

Oct. 9—Order enlarging time to Dec. 14, 1935 for preparation of evidence and delivery of record entered.

Dec. 2—Motion for extension to 1/14/36 to com-

*Page numbering appearing at the foot of page of original certified Transcript of Record.

1935

plete and transmit record filed by General Counsel.

Dec. 2—Order enlarging time to Jan. 14, 1936 for preparation of evidence and delivery of record entered.

Dec. 5—Statement of evidence lodged.

1936

Jan. 3—Motion for extension to Feb. 5, 1936 to complete and transmit record filed by General Counsel.

Jan. 3—Order enlarging time to Feb. 5, 1936 for preparation of evidence and delivery of record entered.

Jan. 9—Praecipe filed—proof of service thereon.

Jan. 9—Notice of lodgment of statement and setting for hearing Jan. 8, 1936 filed—proof of service thereon.

Jan. 11—Notice of lodgment of statement with hearing notice 1/22/36 filed.

Jan. 15—Notice of lodgment of statement with hearing notice 1/22/36 filed—proof of service thereon.

Jan. 22—Hearing had before Mr. Leech on approval of statement of evidence—ordered that statement of evidence heretofore lodged by approved.

Jan. 22—Order that statement of evidence for the petitioner-on-review heretofore lodged by approved entered.

Jan. 24—Transcript of hearing of Jan. 22, 1936 filed. [2]

United States Board of Tax Appeals.

Docket No. 47415.

BERKELEY HALL SCHOOL, Inc.,
a corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, IT:AR:C-5 RL-60D, dated December 14, 1929, and as a basis of its proceedings alleges as follows:

1. The petitioner is a corporation with its principal office at 300 North Swall Drive, Beverly Hills, California.

2. The notice of deficiency, a copy of which is hereto attached and marked Exhibit A, was mailed to the petitioner on December 14, 1929.

3. The taxes in controversy are income taxes for the fiscal year ending June 30, 1925, and for $12,021.99, the whole of said tax being in dispute.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining any deficiency in tax against petitioner for the

fiscal year ending June 30, 1925, for the reason that the income subjected to tax by respondent was not in fact income of petitioner but capital. [3]

(b) The respondent erred in determining a deficiency in tax against petitioner for the fiscal year ending June 30, 1925, for the reason that the property acquired by petitioner and determined by the respondent as income was acquired by gift and was not income to the petitioner, and therefore exempt from taxation.

(c) The respondent erred in failing to find that petitioner received the property of Tract No. 3613, which was applied for school purposes, in trust and that under said trust said property was to be held forever for educational purposes and no part of the net earnings thereof could inure to the benefit of any private shareholder or individual.

(d) The respondent erred in failing and refusing to determine the alleged income for the fiscal year ending June 30, 1925, under the provisions of Section 231 (6) or Section 213(b) (3) of the Revenue Act of 1924.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

For many years prior to 1923, the three ladies, incorporators and owners of the stock of petitioner corporation, had operated a private school for children in the City of Los Angeles, California; the

parents of most of the children attending said school were of Christian Science faith or students of Christian Science. Late in the year 1922, a group of the parents of the children attending said school formulated the plan of purchasing for and in behalf of the school a large tract of land situate in Beverly Hills, California, with the plan in mind of selling sufficient of the acreage to meet the purchase price and leave an overplus to be used in the construction of new school buildings on the balance of the unsold acreage, [4] thus definitely providing the school with grounds and a fund for the reestablishment thereof. In order to finance the purchase of the tract, it was necessary that certain staunch friends of the school enter into a certain written guarantee for the benefit of the seller of said tract under which they became responsible for the initial payment of the purchase price. Title to the school property was, however, taken in the name of petitioner, a private corporation, nevertheless the fund and property so received for school purposes was impressed with a trust for the establishment and maintainance thereon of a school in which the principals and those interested were devoted to the Christian Science faith.

The respondent has erroneously determined that the value of the land so received by the school together with the proceeds of the sale of the other acreage to be applied for the erection of school buildings was income to petitioner. Of the total consideration involving this huge undertaking only

$1,000.00 was subscribed by the school, the balance being realized by its friends and from the sale of the acreage. It is therefore apparent that the fund and property so received by the school represented a gift from the friends of the enterprise, without whose support the project could not have been realized, and by reason of the understanding between the parties involved for the establishment and dedication of the tract for school purposes, the property was impressed with a trust for educational purposes and not for profit, which trust has at all times been carried out and its terms complied with.

WHEREFORE, petitioner prays that this Board may hear the proceedings and determine that the respondent erred in failing to [5] find that the real and personal property so received by petitioner was a gift to it and as such was impressed with a trust for educational purposes and not for profit or gain.

CLAUDE I. PARKER
RALPH W. SMITH
Counsel for Petitioner.
808 Bank of America Bldg.,
Los Angeles, California. [6]

State of California
County of Los Angeles—ss.

LEILA L. COOPER, being first duly sworn, says that she is the President of the petitioner corporation, and that she is duly authorized to verify the foregoing petition; that she has read the foregoing

petition, or had the same read to her, and is familiar with the statements contained therein, and that the facts stated are true, except as to those facts stated to be upon information and belief, and those facts she believes to be true.

LEILA L. COOPER

Subscribed and sworn to before me this 6th day of February, 1930.

[Seal] PEARL ANDERSON

Notary Public, in and for the County of Los Angeles, State of California. [7]

EXHIBIT "A".

TREASURY DEPARTMENT
Washington
Office of
Commissioner of Internal Revenue

Dec. 14, 1929.

Berkeley Hall School, Incorporated,
300 North Swall Drive,
Beverly Hills, California

Sirs:

In accordance with Section 274 of the Revenue Act of 1926, you are advised that the determination of your tax liability for the fiscal years ended June 30, 1924, 1925, 1926 and 1927 discloses a deficiency of $12,021.99, as shown in the statement attached.

The section of the law above mentioned allows you to petition the United States Board of Tax

Appeals within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the inclosed Form 866 and forward both original and duplicate to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement form will expedite the closing of your return by permitting an early assessment of any deficiencies and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the agreement form, or on the date assessment is made, whichever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiencies.

Respectfully,
ROBT. H. LUCAS,
Commissioner.
By DAVID BURNET
Deputy Commissioner.

Inclosures:
Statement
Form 866
Form 882 [8]

STATEMENT.

IT:AR:C-5
RL-60D

In re: Berkeley Hall School, Incorporated,
300 North Swall Drive,
Beverly Hills, California

TAX LIABILITY.

Years	Corrected Tax Liability	Tax Previously Assessed	Deficiency
Fiscal, ended			
June 30, 1924	None	None	None
June 30, 1925	$12,021.99	None	$12,021.99
June 30, 1926	None	None	None
June 30, 1927	None	None	None
Totals	$12,021.99	None	$12,021.99

Reference is made to the reports of the Internal Revenue Agent in Charge and to your protests submitted under dates of October 26, 1928 and August 2, 1929.

Careful consideration has been accorded your protest in connection with the agent's findings and the report on the conferences held with your representative on November 7, 1928 and September 16, 1929, in the office of the Agent in Charge. The adjustments recommended by the agent as the result of the conferences have been approved by this office.

1924

Tax liability reported and accepted	None

1925

Net income reported on return	$ 991.14
Add:	
1. Distributive share of income from Trust #109	111,883.88
Net income as adjusted	$112,875.02

EXPLANATION OF ADJUSTMENT

1. It has been held by this office that since the Rodeo Land and Water Company qualifies as a Trust under Section 704 of the Revenue Act of 1928 the income received by you is taxable. [9]

COMPUTATION OF TAX

Net income	$112,875.02
Less:	
Loss for 1924	18,584.94
Balance taxable at 12½% and 13%	$ 94,290.08
Amount of tax at 12½%	$ 5,893.13
Amount of tax at 13%	6,128.86
Total tax	$ 12,021.99
Original tax	None
Deficiency	$ 12,021.99

1926

Tax liability reported and accepted	None

1927	
Tax liability reported and accepted	None

Consent which will expire December 31, 1929, except as extended by the provisions of Section 277(b) of the Revenue Act of 1926, is on file for the year 1925.

[Endorsed]: Filed Feb. 10, 1930. [10]

[Title of Court and Cause.]

ANSWER.

The Commissioner of Internal Revenue, by his attorney, C. M. CHAREST, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits the allegations of Paragraph 1.
2. Admits the allegations of Paragraph 2.
3. Admits the allegations of Paragraph 3.
4. (a) Denies the error complained of in Paragraph 4 (a).
   (b) Denies the error complained of in Paragraph 4 (b.
   (c) Denies the error complained of in Paragraph 4 (d).

5. As to the first subparagraph of Paragraph 5, the Commissioner admits that for many years prior to 1923, the three ladies, incorporators and owners of the stock of petitioner corporation, had operated a private school for children in the City of Los An-

geles, California; the parents of most of the children attending said school were of Christian Science faith or students of Christian Science. Late in the year 1922, a group of the parents of the children attending said school formulated the plan of purchasing a large tract of land situated in Beverly Hills, California; and denies the remainder thereof.

Denies the matter set forth in the second subparagraph of Paragraph 5. [11]

Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the taxpayer's petition be denied.

(Signed) C. M. CHAREST
General Counsel
Bureau of Internal Revenue.

Of Counsel:

JOHN E. MARSHALL,
Special Attorney,
Bureau of Internal Revenue.

[Endorsed]: Filed Mar. 29, 1930. [12]

[Title of Court and Cause.]

FINDINGS OF FACT AND OPINION.

Promulgated January 24, 1935.

1. EXEMPTION—CHARITABLE ORGANIZATION.—Where a corporation is not both "organized and operated exclusively" for educational

or other purposes named in the Revenue Act of 1924, section 231 (6), HELD it is not exempt from income tax thereunder. James Sprunt Benevolent Trust, 20 B. T. A. 19, followed.

2. INCOME — TRUSTEE FOR CHARITABLE PURPOSE.—Where certain individuals caused certain property to be conveyed to petitioner without cost to it with the understanding that such property together with the income derived from its sale, was to be devoted to a definite charitable use, namely, the establishment and maintenance, in perpetuity, of a school for children under the influence of the Christian Science faith, and, under such conditions, attempted application of the fund by petitioner for its own individual use would be subject to restraint by a court of equity and a constructive trust declared, it is HELD that income accruing from the sale of such property, in carrying out the purposes intended, was not taxable to petitioner.

Ralph W. Smith, Esq., Girard F. Baker, Esq., and L. A. Luce, Esq., for the petitioner.

C. H. Curl, Esq., for the respondent.

This proceeding involves a deficiency in income taxes for the fiscal year ending June 30, 1925, in the sum of $12,021.99.

The amendment to the petition included herein the fiscal years ending June 30, 1924, 1926, and 1927. Since the respondent has not determined any deficiencies for other than the fiscal year ending June 30, 1925, this Board has no jurisdiction in respect of any other years. The proceedings are, therefore, dismissed so far as they relate to other

than the fiscal year ending June 30, 1925. Standard Island Creek Coal Co., 28 B. T. A. 697.

The petitioner, by its assignments of error, raises four issues, which are:

1. Whether the petitioner is entitled to an exempt status for the fiscal year ending June 30, 1925, under the provisions of section 231 (6) and section 213 (b) (3) of the Revenue Act of 1924. [13]

2. Whether the petitioner received the property by purchase or in trust for the furtherance of educational purposes.

3. Whether if a profit was realized, the taxability of same must be deferred until the tract of land acquired by petitioner is disposed of that it may be determined whether or not the transaction results in net income.

4. Whether respondent employed the proper method in arriving at the simulated net income of petitioner.

FINDINGS OF FACT.

The petitioner was incorporated in 1920 under the laws of the State of California as a private educational institution. Its stock, since incorporation, has been owned in equal parts by two Misses Cooper and a Miss Stevens. The school was originally organized in 1911 by the two Misses Cooper, who were later joined by Miss Stevens, for the purpose of training and instructing children and wards of Christian Scientists.

The school progressed from its inception, but

the organizers drew no salaries and used the small profits for the purchase of additional property for the school. In 1923 the net value of the property of petitioner was approximately $12,000.

In 1923, because of the lack of recreation facilities for the older children, petitioner found it impossible to continue and was preparing to close the school and rent the buildings to provide its stockholders with income upon which to live. When the parents of the children in the school became aware of this condition they became much disturbed as the discontinuance of the school would leave them without a school for children operated under the influence of the Christian Science faith. They were intensely interested in the maintenance of such a school. A meeting was called, attended by some sixty parents, at which the situation was discussed and an informal organization of the parents was effected. A study of the situation was determined upon to work out some method of securing the continued operation and maintenance of a school of the character desired. One plan considered was to procure a loan for this petitioner, upon a guarantee or endorsement of the parents, of sufficient funds for it to acquire the necessary properties for its continued operation. In connection with this plan a certain paper was executed and signed by a number of the parents as follows:

Los Angeles, California,
April 13th, 1923.

We the undersigned hereby agree to be one of twenty or more signers to a guarantee to a

certain Bank or Trust Company in Los Angeles, California, to be selected by Berkeley Hall School. This guarantee not to exceed Two hundred fifty Thousand Dollars ($250,000 and to be secured by fifty or more acres of land in Los Angeles County in the Beverly District as outlined at a meeting held this date at Berkeley Hall School. [14]

This guarantee was, however, not used. One of the parents of the children, a Mr. Gilchrist, who had been quite active in the efforts of the parents to work out some solution of the problem, was a prominent real estate operator, experienced in subdivision work. This man learned of a tract of land available for purchase in Beverly Hills, California, consisting of approximately 77.3 acres. Upon approaching the owners of this tract, the Rodeo Land & Water Co., he secured an offer from this company that it would give an option to purchase the tract for $462,180, payable $100,000 upon the execution of the conveyance and the balance at stated intervals. For a 10-day option this company required a deposit of $10,000, to be forfeited if the option was not exercised.

A meeting of the parents was immediately called by Gilchrist and informed of the offer. A plan was submitted by him for a subdivision of the property into lots and a sale of all the property with the exception of approximately seven acres which would be set aside for school buildings. The price set upon the lots sold was to be fixed in amounts to return

sufficient money to pay the purchase price of the entire tract, plus approximately $80,000 which it was estimated would be necessary to erect the school buildings required. Under this plan it was proposed that the parents would purchase the lots at the prices fixed and any lots not sold in this way would be offered to the public. It was contemplated that the parents would be able to dispose of these remaining lots to their friends and associates.

This plan appeared feasible to the parents, who thereupon directed that the option be procured. Certain of the parents advanced the required sum of $10,000, although receipt therefor was taken in the name of petitioner. It was understood that if the option was exercised this amount would be returned to them, both of which occurred. The option was thereupon procured by the payment of the $10,000 advanced and was taken in the name of petitioner.

Immediately upon the signing of the option, Gilchrist platted its subdivision into lots and computed a sale price for each lot. This sales price was determined by assigning to each lot a proportionate amount of the cost of the entire tract and a proportionate amount of the estimated cost of subdivision. To the cost of each lot as thus determined there was added in each instance a proportionate amount of the sum necessary to pay the cost of the seven acres set aside as a location for the school and the $80,000 determined upon as necessary to be raised for the erection of the school buildings. Upon completion of these computations Gilchrist presented them at a

meeting of the parents and the subdivision of the property was exhibited to them with the prices which each lot would carry. The parents were called upon to subscribe for the purchase of as many [15] lots as possible on this agreed basis. The parents made a very substantial response to this request and subscribed for a large number of lots, some of them taking as many as five lots, the particular lot or lots subscribed for being then and there selected by the purchasers.

Thereupon the Bank of America of Los Angeles, California, was requested to act as trustee for the purpose of taking title to the tract of land in question, executing the conveyances of the several lots, collecting the proceeds of sale and paying the development costs and the several payments to be made to the Rodeo Land & Water Co. It was contemplated that the bank would be required to advance approximately $135,000 for the making of the initial payments and that this amount would be repaid to it from the proceeds of lot sales, but before it would agree to accept the trust and obligate itself to make the necessary advance, the bank required the parents individually to guarantee such advance and this guarantee was thereupon executed by them in this amount. It afterward developed that this guarantee was unnecessary as the down payments on lots sold were sufficient to meet all the payments required of the bank as trustee.

Upon the bank agreeing to act as trustee in the subdivision of the property, the parents caused to be executed a deed of trust which designated the

bank as trustee, the Rodeo Land & Water Co. as the seller of the property, and the petitioner, Berkeley Hall School, as beneficiary. It signed the trust instrument at the request and direction of the committee of the parents' organization which was handling the matter. The three stockholders and officers of petitioner were women without business experience. The president of petitioner signed the trust instrument merely because directed to do so and upon the assurance that its execution would make possible the execution of the plan conceived by the parents for the establishment of a school for children under the influence of the Christian Science faith.

The sale of all the lots in the subdivision was effected within a very short period. All but two or three of the lots were sold before the examination of the title to the tract had been completed and conveyance of the property had been made to the trustee by the Rodeo Land & Water Co. When that title was finally transferred to the trustee there had already been delivered to it by Gilchrist, who was in charge of sales, executed contracts for lot purchases and deeds covering these, for execution by the trustee, in respect of nearly every lot in the subdivision. The cash at that time in the hands of the trustee, and representing down payments on these lot purchases, [16] was in excess of the $100,000 initial cash payment required to be made to the Rodeo Land & Water Co.

The parents of the children of the school operated

by petitioner had no intention, in arranging for and effecting the acquisition of this property by petitioner, that the amounts voluntarily paid by them in excess of the cost of such lots, together with the benefits and income resulting from their activities in the sale of lots and represented ultimately by the cash and land transferred by the trustee to the petitioner, should inure in any way to the personal benefit of petitioner and its stockholders. It was at all times their intention that this property and the profits accruing thereon in the course of the transaction, initiated and carried through by them, should constitute a fund for the establishment and maintenance in perpetuity of a school for children at Beverly Hills, California, to be operated under the influence of the Christian Science religion. This plan and purpose of the parents of the children was at all times understood and acquiesced in by petitioner and its stockholders. It realized always that the properties which would come into its hands as the result of the several transactions above described, carried out at the instance of the parents of the children and without cost to petitioner, would be received by it for use only for the purposes for which intended by the parents, namely, the establishment in perpetuity of a school of the character desired. That the purpose of the transactions in the acquisition of this property was charitable was recognized by the Bank of America as trustee and its charge for acting in this capacity was for that reason reduced to one third of the usual and customary amount.

The lots in question were ultimately disposed of and the profit realized by the Bank of America as trustee in the taxable year 1925 was the sum of $111,883.88. Those profits are the basis for the pending deficiency. The trustee paid over to petitioner the funds in its hands remaining after payment of the purchase price of the tract to the Rodeo Land & Water Co. and the payment of development and trustee's expenses. The amounts so paid to petitioner were entered upon its books in a separate account from its own funds and were expended under direction of a committee of the parents' organization in the erection of buildings upon the seven-acre tract. The trust of the Bank of America was terminated in 1927 by the transfer of the title to the seven-acre tract mentioned, by quitclaim deed, to petitioner as "beneficiary" of the trust.

Petitioner, upon receipt of the property coming to it as "beneficiary" of the trust in question, itself made an effort to secure the perpetuation of this fund or foundation in accordance with the [17] desire and intention of the parents' organization. A prominent member of the Christian Science Church made a trip to Boston, Massachusetts, to the headquarters of the church and asked, for petitioner and the parents' organization, that the church accept a transfer of the properties from petitioner and act as the permanent trustee in administration of the fund. This request was refused by the church for the reason that its activities were limited to those religious. Under its rules it could not assume as trustee the operation of a school. Steps were

thereupon taken to effect the same result through a permanent trustee other than the Christian Science Church and at the time of the hearing of this proceeding this arrangement had either been finally completed or was then being effected. Pending the appointment of a permanent trustee the property has been administered by a board of trustees on which the three stockholders of petitioner have membership.

Respondent concluded the trust above mentioned with the Bank of America as trustee was such a trust as is described in section 704(b) of the Revenue Act of 1928,[1] and, since on September 18, 1928, such trustee filed its election under the provisions of that section to have its income taxed to its "beneficiary", the petitioner, the pending deficiency was determined.

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[1] Sec. 704. (b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

OPINION.

LEECH: The petitioner is a corporation which owned and operated a school for children of persons in Los Angeles, California, who were interested in Christian Science. It was about to discontinue this school in 1923 because of a lack of necessary facilities. When the parents of some of the students of the school learned of its proposed discontinuance they discussed the situation among themselves and finally adopted a plan to secure necessary real estate and a sufficient sum of money to provide and perpetuate in Los Angeles a school for children of persons interested in Christian Science. In order to obtain the real estate and the necessary cash this group of parents planned to obtain a tract of land, retain a plot for the school, and subdivide and sell the remaining lots at a sufficient profit to create the fund desired. The Bank of America was named as [18] trustee to purchase the property, subdivide it, sell and convey the lots, and finally to transfer to the petitioner the plot retained for the school and the fund realized from the profit in the sale of the lots. The petitioner understood this plan and was party to it. The petitioner was called a "beneficiary" of the trust of which the bank was trustee. But it was thoroughly understood by all interested parties that when the petitioner should receive the plot of ground and the net proceeds from the sale of the lots it would receive these things, not for its own use and benefit, but in a fiduciary capacity only. These net proceeds were turned over to the peti-

tioner by the bank in 1925. The Commissioner has determined the present deficiency in the income tax of this petitioner on the theory that these net proceeds received by the petitioner in 1925 represent income to the petitioner in its ordinary corporate capacity.

Petitioner contends that it is personally exempt from income tax under section 231 (6) of the Revenue Act of 1924[2] as a corporation "organized and operated exclusively for educational purposes no part of the net earnings of which inures to the benefit of any private shareholder or individual." This position is untenable. Petitioner is a private corporation, organized for profit. The mere fact that it has not distributed its earnings to its stockholders is not controlling. It has such right and there is nothing which precludes its exercise. Consequently it is not entitled to the exemption provided. James Sprunt Benevolent Trust, 20 B. T. A. 19; Journal of Accountancy, Inc., 16 B. T. A. 1260. Cf. Bowers v. Slocum, 20 Fed. (2d) 350; Sand Springs Home, 6 B. T. A. 198; Young Men's Christian Association Retirement Fund, Inc., 18 B. T. A. 139; The Jockey Club, 30 B. T. A. 670.

But the taxability of this fund in petitioner's hands, on the facts here disclosed, must be resolved

[2] Sec. 231. (6) Corporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

by the application of other principles. Respondent has proposed and is insisting upon the pending deficiency against petitioner, not as trustee, but in its individual capacity. Cf. Mary M. Shea, 31 B. T. A. 513. Thus, none of the fund in dispute is taxable here, unless received by this petitioner for its "separate use, benefit and disposal", Eisner v. Macomber, 252 U. S. 189, and subject to its "unfettered command." Corliss v. Bowers, 281 U. S. 376. Obviously, the funds supporting the present deficiency had no such character in petitioner's hands.

It appears clear upon careful consideration of the record that the fund in question represents the voluntary contribution of the [19] organization of parents of the students at petitioner's school, and the result of the labors of these parents in effecting sales of lots under a plan conceived and carried out by them. The purpose of this plan was the establishment and maintenance, in perpetuity, of a school for children under the influence of the Christian Science faith. This purpose and plan of the parents was definitely understood by petitioner. Petitioner paid no money. The petitioner was used only as a convenience in carrying out the plan. The only consideration passing from it for its receipt of the disputed funds and the real estate was petitioner's agreement to accept them in accordance with that plan and purpose. That this property and presently disputed proceeds were so received by petitioner is further supported by the evidence of the action taken by petitioner immediately thereafter. These proceeds, always kept in a separate account

from petitioner's individual funds, were, from the time of their receipt, administered by a committee representing the organization of parents interested in the plan. The petitioner and the parents' organization attempted to effect the charitable object through the appointment of the Christian Science Church as a permanent trustee of the property and fund, as soon as received. Following failure in that effort, they continued to perfect the necessary arrangements to secure the use of the property and fund in perpetuity for the purpose specified.

Respondent proposes the present deficiency against petitioner as "beneficiary" of such a trust as is described in the Revenue Act of 1928, section 704 (b), supra, which is said to conclude us here because of its retroactive application. But "beneficiary", as there used, has its ordinary and generally understood meaning in the law of trusts, which does not include petitioner on the present record. See Theodore P. Grosvenor, 31 B. T. A. 574; Percy H. Clark, 31 B. T. A. — (No. 196); Franklin Miller Handly, 30 B. T. A. 1271. Petitioner has never treated this fund or property as its own. It did not receive either of them for use in its individual corporate purposes. All of petitioner's disclosed actions indicate an understanding on its part that its receipt and holding was, not in its individual corporate capacity, but as trustee of a trust created for the purpose of providing and perpetuating a school for the children of students and friends of Christian Science. This was a juristic, charitable trust of which indefiniteness of the beneficiaries is

characteristic. Russell v. Allen, 107 U. S. 163; In re Graham's Estate, 63 Cal. A. 41; 218 Pac. 84. If and when petitioner receives compensation from this trust for the operation of the trust's school, another and different tax question arises. [20]

It is true that the title as taken by this petitioner to the real estate was by an absolute transfer and not one expressing a trust. However, the rule appears clear in California that in the case of such a transfer, whether of real or personal property, if made with the understanding on the part of the grantee of the property that it will be held in trust for definite private purposes, and such understanding or agreement is the consideration for the transfer, its use for any purpose other than that agreed upon will be restrained by a court of equity under a constructive trust declared. Cooney v. Glynn, 157 Cal. 583; 108 Pac. 506; Lauricella v. Lauricella, 118 Pac. 430; Hayne v. Hermann, 97 Cal. 259; 32 Pac. 171; Simons v. Bedell, 122 Cal. 341; 55 Pac. 3; Brison v. Brison, 75 Cal. 525; 17 Pac. 689; Adam v. Lambard, 80 Cal. 426; 22 Pac. 180; Alaniz v. Casenave, 91 Cal. 43; 27 Pac. 521; Hays v. Gloster, 88 Cal. 560; 26 Pac. 367; Butler v. Hyland, 89 Cal. 575; 26 Pac. 1108. The same result would follow here where such agreement was to hold in trust for a public or charitable purpose. Political Code of California 1923, art. 8, secs. 470, 472; General Laws of California 1931, Acts 8698, 8699, 8700, 8701; Long v. Union Trust Co., 272 Fed. 699; affd., 280 Fed. 686. Thus, even if respondent were proceeding against this petitioner, as trustee, the fund, the sub-

ject of the pending deficiency, would probably be exempt under the Revenue Act of 1924, section 231 (6), supra.

Consequently, if petitioner attempted to distribute this property or fund to its stockholders or to devote it to any other purpose than that intended and clearly understood, it could have been restrained from doing so. *A fortiori,* it can not be held here that receipt of any part of this fund or property represented income to petitioner. Freuler v. Helvering, 291 U. S. 35.

Reviewed by the Board.

Decision will be entered for the petitioner.

SEAWELL, dissenting: I am unable to agree with the conclusion reached by the Board under what appears to me to be the plain undisputed facts of this case.

In 1923 petitioner was a private corporation conducting a school for profit. What other powers and privileges it had do not appear, as its charter was not offered in evidence. It needed for the school more space and added facilities. The Rodeo Land & Water Co. owned 77.3 acres of land which it wished to sell. Petitioner did not need all of the land for the school and it did not have the capital to buy the whole tract. Some of its friends agreed to guarantee to a bank payment of certain loans it needed for money with [21] which to make certain advance payments on petitioner's contract to purchase the land. The Rodeo Land & Water Co. agreed to sell the land to petitioner. The loans

from the bank were never made and the guarantors were never liable for any sum on account of their agreement. A scheme was worked out whereby petitioner was enabled to purchase the land without outside aid. A Mr. Gilchrist, a friend of the school, a realtor, surveyed, platted, and subdivided the land. A contract was entered into by the Bank of America, designated as trustee, the Rodeo Land & Water Co., designated trustor, and petitioner, designated beneficiary, in which it was recited that the trustor had agreed to sell to the beneficiary said land for $462,180, and that $100,000 thereof had already been paid by the petitioner from advanced sales of lots. Petitioner was to pay the remainder of the purchase price from the sale of other portions of the land, and petitioner was to bear the expense of laying out and grading the streets, the installation of water mains, telephone and electric poles, and other development costs. The trustee itself made no payments and none of the guarantors or the trustee at that time or any time thereafter made any payment on the purchase price of the land. The land was placed in the hands of the trustee in order to secure the payment by the beneficiary to the trustor and to facilitate the transfer of title to lots sold by the beneficiary. The scheme was carried out. The trustee held the funds received from the sale of lots; paid the expenses of Gilchrist for making the subdivision; paid itself for the acceptance of the trust $250 and certain percentages on the sale price of lots executed by it, and a closing fee of $250 and paid and discharged the obligations of the petitioner, the beneficiary, to the Rodeo Land

& Water Co., the trustor; then the trustee quit-claimed the schoolhouse lot and other portions of the 77.3 acres and paid the profits on the sales, more than $100,000, to the petitioner.

The property turned over to petitioner was not a gift and therefore is includable in gross income and section 213 (b) (3) of the Revenue Act of 1924, relied on by petitioner, is not applicable. The further provision of law, section 231 (6), relied on by petitioner, also is not applicable because the net earnings of petitioner inure to the benefit of the private shareholders of petitioner. [22]

United States Board of Tax Appeals
Washington

Docket No. 47415.

BERKELEY HALL SCHOOL, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated January 24, 1935, it is

ORDERED and DECIDED: That there is no deficiency for the fiscal year ending June 30, 1925.

Enter:

[Seal] (Signed) J. RUSSELL LEECH
Member.

[Entered]: Jan. 31, 1935. [23]

In the United States Circuit Court of Appeals for the Ninth Circuit.

B. T. A. No. 47415

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

vs.

BERKELEY HALL SCHOOL, INC.,

Respondent.

PETITION FOR REVIEW AND ASSIGNMENTS OF ERROR.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

COMES NOW Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Frank J. Wideman, Assistant Attorney General, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and Charles P. Reilly, Special Attorney, in the office of the Assistant General Counsel for the Bureau of Internal Revenue, and respectfully shows:

I.

That the petitioner on review (hereinafter called the Commissioner) is the duly qualified and acting Commissioner of Internal Revenue of the United States and holds his office by [24] virtue of the laws thereof; that the respondent on review, Ber-

keley Hall School, Incorporated, (hereinafter called the taxpayer) is a corporation organized and doing business in the State of California, and for the taxable year herein involved filed its income tax return in the office of the Collector of Internal Revenue located Los Angeles, California, which is within the jurisdiction of this Court.

II.

That the nature of the controversy is as follows:

The taxpayer is a private corporation which is owned and operated by three individuals. Its business is the maintenance and operation of a private school for children whose parents are Christian Scientists. In 1923 the stockholders were contemplating closing the school because of the lack of adequate recreation facilities. The parents of the children, however, were intensely interested in its continuance and sought ways and means to prevent its closing. A meeting was called, attended by some sixty parents, at which the matter was discussed, and it was determined to study the situation with a view to working out some plan to insure the continued operation and maintenance of a school of the character desired.

The plan finally adopted was one suggested by a Mr. Gilchrist, a real estate operator and the parent of one of the pupils. Under the plan arrangements were made for the purchase of a 77.3 acre tract of land from the Rodeo Land & Water Company for $462,180.00, with an initial payment of $100,000.00

to be made upon execution of the [25] conveyance and the balance to be paid at stated intervals. The land was to be subdivided into residential lots and sold at a profit, with the exception of a seven acre tract which was to be retained as a site for a new school to be erected out of the profits from the sale of the lots. The Bank of America of Los Angeles agreed to loan the initial payment and to act as trustee for the purpose of taking title to the land, executing conveyances to lot purchasers, collecting the proceeds of sales and paying the development costs and the several payments to be made to the Rodeo Land & Water Company. In making the initial payment the bank was to be protected by the individual guarantee of the parents. It developed, however, that many lots were contracted for in advance and that no loan by the bank and no guarantee by the parents was necessary as the down payment on the lots contracted for was sufficient to meet all payments required.

Pursuant to the plan the deed executed by the Rodeo Land & Water Company designated the bank as trustee and the Berkeley Hall School, Incorporated, as beneficiary. All of the lots were sold within a short time and the profit realized in the fiscal year 1925 was $111,883.88. The trustee quitclaimed the seven acres to the taxpayer and paid over the fund, representing the profit on the sale of the lots, to the taxpayer. [26]

The taxpayer did not include any part of the $111,883.88 profit on the sale of the lots in its return

for the fiscal year 1925. Under date of September 18, 1928 the trustees exercised the option provided in Section 704 (b) of the Revenue Act of 1928 and gave notice of its election to have the income of the trust taxed to the beneficiary for the years 1924 to 1927, inclusive. The Commissioner added the profit on the sale of the lots amounting to $111.883.88 to the income reported by the taxpayer for the fiscal year 1925 and mailed to the taxpayer a notice of deficiency in tax arising from said addition to its income, as provided by law.

In due course the taxpayer filed an appeal from the determination of the Commissioner and prosecuted said appeal to hearing before the United States Board of Tax Appeals. Thereafter, the said Board rendered an opinion holding that the profit of $111,883.88 on the sale of the lots did not constitute taxable income to the Berkeley Hall School, Incorporated. In due course, on January 31, 1935, the said Board entered its decision pursuant to and in accordance with its opinion.

The Commissioner being aggrieved by said opinion and decision of the United States Board of Tax Appeals, desires a review thereof in accordance with the statutes in such cases made and provided, by the Circuit Court of Appeals of the United States for the Ninth Circuit, in which power of such review is vested. [27]

III.

The Commissioner as a basis for such review assigns the following errors:

1. The Board erred in holding and deciding that there is no deficiency in income taxes due from this taxpayer for the fiscal year 1925.

2. The Board erred in failing to hold that the net proceeds from the sale of the lots, amounting to $111,883.88 was taxable income to Berkeley Hall School, Incorporated, for the fiscal year 1925.

3. The Board erred in failing to find a deficiency in tax of $12,021.99 due from the taxpayer for the fiscal year 1925.

4. The Board erred in failing to sustain the determination of the Commissioner.

5. The Board erred in finding that it was thoroughly understood by all interested parties that when the taxpayer should receive the plot of ground and the net proceeds from the sale of the lots it would receive these things not for its own use and benefit, but in a fiduciary capacity only. [28]

6. The Board erred in finding that the fund derived from the sale of the lots represents the voluntary contribution of the organization of parents of students at the taxpayer's school, there being no substantial evidence to support such conclusion.

7. The Board erred in finding that the only consideration passing from the taxpayer for its receipt of the disputed funds and the real estate was the taxpayer's agreement to accept them in accordance with the plan of the parents to estab-

lish and maintain perpetuity a school for children under the influence of the Christian Science faith, there being no substantial evidence to support such conclusion.

8. The Board erred in holding that the term "beneficiary" as used in Section 704(b) of the Revenue Act of 1928 does not include the taxpayer on the present record.

9. The Board erred in holding that the taxpayer never treated the fund or property as its own, and did not receive either of them for use in its individual corporate purposes, there being no substantial evidence to support such conclusion.

10. The Board erred in holding that all of the taxpayer's disclosed actions indicate an understanding on its part that its receipt and holding of the fund and property were not in its individual corporate capacity, but as trustee of a trust created for providing and perpetuating a school for children of students and friends of Christian Science, there being no substantial evidence to support such conclusion. [29]

11. The Board erred in holding that if the taxpayer attempted to devote the property or fund to any other purpose than that of providing and perpetuating a school for children of Christian Scientists it could have been restrained from doing so by a court of equity under a constructive trust declared.

12. The Board erred in holding that if the taxpayer attempted to devote the property or fund to any other purpose than that of providing and perpetuating a school for children of Christian Scientists it could have been restrained from doing so by a court of equity under a constructive trust declared, there being no substantial evidence to support such conclusion.

WHEREFORE, the Commissioner petitions that the opinion and decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, that a transcript of the record be prepared in accordance with the law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

(Signed) FRANK J. WIDEMAN
Assistant Attorney General

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue.

CPR/mhk 4/13/35

Of Counsel:

CHARLES P. REILLY
Special Attorney, Office of the Assistant General Counsel for the Bureau of Internal Revenue. [30]

VERIFICATION OF PETITION FOR REVIEW.

United States of America
District of Columbia—ss.

Charles P. Reilly, being duly sworn, says that he is a Special Attorney in the office of the Assistant General Counsel for the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

(Signed) CHARLES P. REILLY

Sworn and subscribed to before me this 13th day of April, 1935.

(Signed) GEORGE W. KREIS
Notary Public.

My commission expires Nov. 16, 1937.

[Endorsed]: Filed Apr. 13, 1935. [31]

[Title of Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To:

Berkeley Hall School, Incorporated,
300 North Swall Drive,
Beverly Hills, California.

Ralph W. Smith, Esq.,
819 Title Insurance Building,
Los Angeles, California.

You are hereby notified that the Commissioner of Internal Revenue did, on the 13th day of April, 1935, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 13th day of April, 1935.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the
Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein,

is hereby acknowledged this 17 day of April, 1935.

(Sd) LEILA L. COOPER
Respondent on review.

(Sd) RALPH W. SMITH
Attorney for respondent on review.

[Endorsed]: Filed Apr. 22, 1935. [32]

[Title of Court and Cause.]

STATEMENT OF EVIDENCE.

This cause was heard by the Honorable J. Russell Leech, Member of the United States Board of Tax Appeals, at Long Beach, California, on September 26 and 27, 1933. Ralph W. Smith, Esq., and Girard F. Baker, Esq., appeared for the taxpayer, and C. H. Curl, Esq., Special Attorney, in the Office of the Assistant General Counsel for the Bureau of Internal Revenue, appeared for the Commissioner.

The evidence consists of the oral testimony of several witnesses called on behalf of the taxpayer, together with documentary evidence introduced by both sides.

The testimony of

EDWARD D. WILLIAMS,

in narrative form, was as follows:

My name is Edward D. Williams. I reside in Beverly Hills. I have resided in Beverly Hills or in

(Testimony of Edward D. Williams.)

Los Angeles approximately nineteen years. My business is insurance. I am familiar with an organization known as the Berkeley Hall School.

I first became familiar with the institution in 1919, or 1918 perhaps, under the circumstance that my boy was attending the school. It was a school for Christian Science parents, or people interested in Christian Science, who desired to have their children attend a school that had a [33] leaning towards that particular faith. The school was located at that time, on Third Avenue, or Fourth Avenue, in the West Adams District. In the early years, about 1919, the parents held a number of meetings, as the school facilities there seemed to be very much limited, with a view to acquiring property so that the school might be enlarged and perhaps moved to another location. In 1922 or early in 1923 the parents of the children in the school held a number of meetings with a view to forming a committee to look into various sites that might be available for school purposes.

As nearly as I can recall somewhere between forty and sixty parents attended those meetings. Early in 1923, at the meetings, a committee was appointed or agreed to by the various parents, for the purpose of going about and seeing what property might be acquired that would be suitable for school purposes at various locations. They reported back at a number of the meetings that it seemed that the more desirable property was available out in

(Testimony of Edward D. Williams.)

the newer section of Wilshire, out toward Beverly Hills.

We negotiated jointly for the purchase of—in fact there were two, as I recall it now. The first report dealt with one piece of property that proved to be unsuitable and then all seemed to have agreed on another piece of property in Beverly Hills, the property that is now known as the Berkeley Square property. That is where the school is now located. It was ultimately acquired and the school was moved there. There were two agreements as I recall. [34]

(The witness was shown a document.)

I have seen the original of this before. That is my signature. I signed that about that time. The body of the instrument is dated May 1, 1923. The other signatures that appear on there were all entered at that time at the meeting we had. They were parents of the children who were attending the school.

(The document was offered in evidence and objected to as immaterial and irrelevant.)

This (document) was necessary—my recollection now of the conditions surrounding that is the school, or the young ladies in back of the school, did not possess sufficient wealth with which to go to the Rodeo Land Company and purchase any property for school purposes. Hence the parents all combined and presented, through that document there, the fact that they would, as parents, purchase that property and they all so obligated themselves.

(Testimony of Edward D. Williams.)

In that connection, after my signature, you will find an amount of $1,000.00, which represented the obligation that I was willing to assume on behalf of my child going to school, incident to the purchase of that property.

(Thereupon the document in question was admitted in evidence as petitioner's Exhibit No. 1 over objection of respondent.)

I did not, in a direct way, play any part in the acquisition of any of the property that was ultimately purchased from the Rodeo Land and Water Company. That was handled through the Chairman of the Committee. I bought two lots out there. The purpose of acquiring that tract was to subdivide it in such a manner as to provide for the use of the school a certain number of acres on which the school [35] buildings were to be erected. The subdivision was also to include a certain amount of money to go towards the erection of those buildings, so that I bought two lots to reduce it down, in the tract at Doheney and Dayton. That is the particular tract that was acquired for the purpose.

The price of my lots included the necessary subdivision work and any other expense incident to the subdivision, and also a proportion which would make up to the extent of my purchase, the desire that I had to convey to the school.

I purchased two lots in order that I might assist in the perpetuation of that school, which had no means of perpetuating itself. The tract was sub-

(Testimony of Edward D. Williams.)

divided and a price put on each lot leaving a certain amount of acreage for the school. The arrangements by which these lots were purchased and the price put on each were not, to my knowledge, ever put in writing nor made the subject of minutes by the organization of parents. There may have been a secretary at the meetings; I cannot say definitely. I think the representatives of the Berkeley Hall School, the Misses Cooper or Miss Stevens, were present at these meetings, but I am not positive. There were discussions at the meetings to the effect that what money might be derived from the sale of these lots was to go for the erection of a school and the donation of property for school purposes. That was in perpetuity. I had no knowledge that the Berkeley Hall School was a private business corporation, and was not interested. [36]

The plan was to divide the lots in such a manner that the division would create a certain amount of property for school purposes. That was to be given together with any cash surplus that might exist through the sale of the lots. The property was for perpetuation purposes, to continue the school for children of Christian Science parents. That was the purpose of the guarantee which was signed.

The meetings I attended, so far as I can recall, were in 1919. At the meetings we discussed the advisability of acquiring property for school purposes. My thought is that we people on the guar-

(Testimony of Edward D. Williams.)

antee did acquire property. I feel I did buy property because I placed my signature to that form with a limitation on it. I do not know whether it was ever presented to the Rodeo Land Company. I do not know actually whether the contract, or guarantee, was ever taken up there or used. I did not personally take it up there. My thought is that it was taken up there, and my understanding is that it was. I got the understanding from the meetings that we held.

The money for the two lots I bought was paid to one of the Cooper girls. The Cooper girls did not directly have anything to do with the meetings except perhaps to answer inquiries that might have come up. The Cooper girls are the ladies that were running the school that was located on Third Avenue and they are the same ladies that are running it now in Beverly Hills.

I had no reason to know whether they were operating as a partnership, or corporation, or what. I thought I was giving my thousand dollars for the perpetuation of that school, whatever it might be. [37] It was not my understanding that I was paying the thousand dollars in advance on my lot. I did not get a lot for that thousand dollars. I did pay money for two lots after the property was subdivided. I did not exactly know anything about what the arrangements were that were made with the Rodeo Land Company about buying this. I have an idea at the various meetings it was brought out

(Testimony of Edward D. Williams.)

that the Rodeo Land Company would have to have some evidence of responsibility. Evidently the school lacked that responsibility. Hence the parents furnished it through the signatures to that particular form. I do not recall whether that organization tried to borrow the money at the bank or make arrangements at the bank on the guarantee. About the arrangements that were made with the Rodeo Land Company as to how we should buy this land I only know that some arrangement was made. What the details were I do not know. I still have the two lots. I do not know whether I could have sold them at a profit.

My object in guaranteeing the money was because I wanted to perpetuate the school though I did not care whether it was in Beverly Hills or some place else. As to the running of the school my thought was not in any way connected with any church. I did not know who owned the school, whether it was privately owned, corporately owned, or by the church. I do not recall whether the plan discussed at these meetings of parents friendly to the Christian Science faith were ever made effective by any writing at any time. I did not put up a thousand dollars. I guaranteed to put it up should such action [38] become necessary. It was not necessary to put it up. (The Board Member stated he understood the witness to say he had put up $1,000.00.) No, I signed the agreement evidencing my obligation through that agreement to the Rodeo

(Testimony of Edward D. Williams.)

Land and Water Company to the extent of $1,000.00, which I felt was the limit of my liability should this proposed arrangement not go through, and I understood that I was obligating myself to that extent, on the property they had under consideration.

The meetings I referred to were in 1922 or 1923. I am not changing my testimony to 1922 or 1923. I said that I thought the meetings started about 1919, to the best of my knowledge. I do not remember the individual years.

The testimony of

A. L. MARKWELL,

in narrative form, was as follows:

My name is A. L. Markwell. I have resided in this city since 1906 and have been in business here all that time. I became acquainted with the Berkeley Hall School in 1911. I am a member of the Christian Science church as is Mr. Williamson who preceded me. I had one child in the Berkeley Hall School in 1922 or 1923. He started, I think, in 1911 or 1912 and continued until through the eighth grade, or whenever that was finished. I did have transactions in relation to the acquisition of a new school site for Berkeley Hall School in 1922 or 1923. The occasion or reason for that was a lot of us parents wanted to provide grounds or buildings for the

(Testimony of A. L. Markwell.)

school to use and make it perpetual, and we discussed various ways, [39] and finally decided on buying the tract of land and selling and subdividing it, selling the lots for enough to pay for the land and leaving this acreage needed by the school free, and also to provide a little money to put up the building.

We had several meetings and secured an option or a contract from the Rodeo Land and Water Company through Mr. Meline, to purchase the tract bounded by Robertson Boulevard and Wilshire and Doheny and the car line. Before they would go into it they—Mr. Meline said I believe—had to have $125,000.00, or something like that, guaranteed as a first payment. So a number of us signed that guarantee up to $125,000.00. I think I signed up for $10,000.00. We guaranteed to pay the amount and forfeit it if we did not go through with the deal, is my understanding.

(The witness was shown Petitioner's Exhibit No. 1.)

Yes, this is the guarantee to which I refer, showing the amount was $135,000.00. Mr. Meline was the sales agent of the Rodeo Land and Water Company. He represented them in selling their land. I personally discussed it with Mr. Meline, I think, over the phone.

As to the action taken on the guarantee, well, the land was purchased, and subdivided, streets were put in and lots sold, and I bought one of the lots.

(Testimony of A. L. Markwell.)

The prices on the lots were made high enough to cover the purchase of the land, including the land for the school and also to cover the street work and leave some money to build the buildings with.

(Counsel for respondent asked that the foregoing be stricken on the ground that a written contract states what was to be done. The objection was overruled.) [40]

That is what we intended, to give the property to the school. As to the list of names on this guarantee, I think we figured at the time there was easily $2,000,000.00 back of the signatures. I am referring to petitioner's Exhibit No. 1.

I do not know whether this guarantee was ever delivered to the Rodeo people or not. I do not know what happened to the guarantee after I signed it; only that I bought a lot. I was not on the committee that purchased this land and arranged for the declaration of trust and had nothing to do with that end of it other than talking to Mr. Meline, I think, over the telephone.

As to the substance of that talk over the telephone with Mr. Meline, well, in substance, that we wanted to get the land and to do what he could to put the deal through. He was in favor of the school himself. The parents of the children in the school who had signed the guarantee wanted to get the land. I do not recall whether anything was said about the guarantee at that time. I think I told him there was

(Testimony of Eugene Swarzwald.)
enough on there to make good that $120,000.00, if they fell down on it. The wealth of the parents who had signed the guarantee was sufficient to make good the $135,000.00. That was in 1922 or 1923, just before the transaction was consummated. [41]

The testimony of

EUGENE SWARZWALD,

in narrative form, was as follows:

My name is Eugene Swarzwald. I have resided in Los Angeles about sixteen years. I am a Christian Scientist. I had children in the Berkeley Hall School during 1922 and 1923. I am familiar with the circumstances of the acquisition of the new school in Beverly Hills.

As to the meetings I attended and what took place, well, the beginning was Mr. Gilchrist who had a child attending Berkeley Hall School had a discussion with me to the effect that this school should move out further West. We lived in Beverly Hills and we discussed the idea of forming a syndicate of the parents and getting a piece of property sufficiently large . . . Mr. Gilchrist was a subdivider . . . and his proposition to me was that the lots could be sold in sufficient numbers to return enough money to make the school a gift of seven or ten acres of ground. So I helped work out the plans with Mr. Gilchrist which resulted in a meeting of parents. This syndicate was formed

(Testimony of Eugene Swarzwald.)

and we finally acquired this 77 acres, the property that has been described.

There were three or four meetings of the parents. There were instruments or papers signed by the parents in relation to this matter.

(The witness was shown a photostat of a document bearing the date of April 11, 1923 which photostat was subsequently admitted in evidence as petitioner's Exhibit No. 2 over respondent's objection) [42] This guarantee was signed by the parents whose names appear there. I signed it as the first man. It shows that the sum of $250,000.00 was guaranteed on the purchase of a tract. This guarantee of April 11, 1923 was shown to the Rodeo Land and Water Company as evidence as to our ability to finance that 77 acres.

(The document was offered in evidence but was objected to on the ground that it is not an original and not signed by anybody. The objection was sustained at this time, but the document was subsequently admitted in evidence as petitioner's Exhibit No. 2)

(The witness was shown petitioner's Exhibit No. 1).

I think I saw the original of this. I do not recall what, if anything, was done in relation to it. The only recollection I have was that the original group of signers was presented to the Rodeo Land and Water Company to help obtain the property which later was subdivided. I helped work out the plan

(Testimony of Eugene Swarzwald.)

and I helped them get the original land, the 77 acres. I was not on any special committee, I do not think there was any special committee. Mr. Gilchrist seemed to engineer the whole thing individually. I went to the Rodeo Land and Water Company alone and talked with Mr. Meline. I cannot say whether the guarantee, which is petitioner's Exhibit No. 1, was exhibited to the Rodeo Land and Water Company or to Mr. Meline, or to both. I know one was exhibited to Mr. Green, the head of the Rodeo Land and Water Company, but which one it was I cannot say at this moment. [43]

(At this point the document bearing date of April 13, 1923 was marked for identification as petitioner's Exhibit No. 2, for identification. This is the same document which was later admitted as petitioner's Exhibit No. 2.)

I did sign a guarantee with other parents of children in the Berkeley Hall School about the year 1923 or thereabouts, I would say within three months before the closing of the transaction with the Rodeo Land and Water Company. The guarantee I signed was used as evidence to show the ability of the parents that formed a syndicate to assure the Rodeo Land and Water Company that the property would be paid for.

(Petitioner's Exhibit No. 2 for identification was again shown to the witness).

This appears to be a copy of that guarantee. I signed the original of this instrument. To the best

(Testimony of Eugene Swarzwald.)

of my knowledge it was also signed by the other parties or parents whose names appear thereon. They were parents in Berkeley Hall School and are Christian Scientists or interested in Christian Science and giving their children the school's teaching or in Christian Science atmosphere.

After the signing of this guarantee Mr. Gilchrist immediately subdivided the property. The property was acquired by Mr. Gilchrist who seemed to handle the whole situation. He represented the syndicate, that is, the parents. [44]

He called a mass meeting of the parents and gave them the privilege of selecting lots from the maps. We all stood in line and selected lots in accordance with our signatures on the list. The person who signed the list first, as guarantor, had the first selection of the lots in that 77 acres. Several blocks were on Wilshire Boulevard, which made that more desirable than other sections, and it was understood that the lots would be sold at cost, which would include the actual necessary expenses in order to free and give clear the approximately 7 to 10 acres to the school, and whatever they would have left over. So the parents who signed this document lined up at a meeting and I remember distinctly that one of the three signers were not there, and that I selected the second one and picked the corner of, at that time, Preuss Road and Wilshire Boulevard. Then after all the parents selected, they had the privilege of selecting more lots and in those

(Testimony of Eugene Swarzwald.)

days of real estate activities we were rather generous in buying lots. Then friends were induced. I induced several of my associates in business to buy lots in that tract, with the result that the entire tract was sold out by Mr. Gilchrist on that plan. Preuss Road is now known as Robertson Boulevard.

I do not know that the school played any part in the acquisition of this property. Their premises were used for one or two of the meetings. The principals in the transaction were practically one man, Mr. Gilchrist, and I presume I came next to him representing the group of parents. There were three or four that were rather active, [45] Mr. Markwell, and Mr. Rosenthal, and one or two others.

In relation to the future of the property and the future of the school, well, it would be said it would be nice if we could have a school that would be perpetuated and organized similar to perhaps, Principia, at St. Louis. Principia is a school that caters to the children of Christian Scientists. The Christian Science Church has no school as a movement. The Berkeley Hall School prior to that time was operated along those lines, to the best of our understanding.

The Berkeley Hall School did not put any money into this transaction that I know of. I did not know at that time whether Berkeley Hall School was a private business corporation. It was my understanding that the property was to be made a sort

(Testimony of Eugene Swarzwald.)

of a trust so that the school could continue indefinitely in relation to this property.

(The witness was shown a document dated June 1, 1923, being Trust No. 109, which document was later received in evidence as joint Exhibit A-1).

I am not familiar with this. I think I know why the name Berkeley Hall School was used in these transactions. It was made plain from the beginning that the project was to help the Berkeley Hall School and it was not a money making proposition; no one was supposed to receive commissions on the sale of the property. I understood, Mr. Gilchrist was to do it at its actual cost, and the reason the Berkeley Hall School was used was to enlist the hearty cooperation of the parents and their friends to get in back [46] of the selling of the lots, for the purpose of clearing off these seven or ten acres for them. Our entire object was to make this land a gift to the school. And it was started when we signed this as signers. We did not know that we were going to actually buy lots. We knew we were participating, but the intention was to raise enough money on the tract to pay for the tract and clear off this property and help the school. That is the reason the Berkeley Hall School name was used.

I was never called on to make good in any way on the guarantee I signed. I know of my own knowledge that that guarantee was used, that form that I signed. Two forms were signed I believe. One of them were used to my knowledge. I do not know

(Testimony of Eugene Swarzwald.)

whether the guarantee, which is Exhibit No. 1, was ever used. There was one previous to that that was used. I do not know why this one was drawn. I never was called on in any way to make good on any of the guarantees, it was unnecessary to. I did not advance money on my lot when we got ready to purchase this land. I did not advance any money, not for lots. I did not pay any in at all. By virtue to my signature to that guarantee I was given the first right to choose lots, so I got the first or second choice. I kept some of the property and sold some of it at a large profit. I did not say that Mr. Gilchrist was to do all this work for nothing. I said that he sold it without profit to himself. I understood whatever commission Mr. Gilchrist received was supposed to be his actual cost. We people in the church did not do most of the [47] selling, we did part of it. I do not know what Mr. Gilchrist's commission was, I know he got a commission and I know he had certain costs. He had his office expense to take care of. I do not think he represented the Rodeo people, he represented himself. He was a real estate broker. I would say he acted as promoter and general———it was his organization that sold the lots.

I do not know whether these girls, operating under the name of Berkeley Hall School, was a private ownership or a corporation. As to how I figured that we were creating a trust, why, I intended to mean that we figured the school would be impersonalized, that one hundred years from now this

(Testimony of Eugene Swarzwald.)

school would still be established as the Berkeley Hall School. I did not look into the fact to see whether I was making this gift to a corporation or an individual or a church, because we had implicit confidence in these people. I do not know that I had implicit confidence in a corporation instead of the people, I did not know whether it was a corporation or what it was. It is a fact that I did not stop to inquire as to whether I was doing these things for an individual or a corporation. When we signed this we were very much concerned. We owned our home in Beverly Hills, and we said at the time if this does not work out successfully we may lose our home, but it happened to be at such a time that real estate was on the upward trend and we were fortunate enough to dispose of the property. Some, however, I still have and I would be very glad to sell it for half of what I paid for it. [48]

I am aware of the fact that a lot of these people paid for these lots in advance and that is the way the money was raised to make the first payment. We guaranteed the Rodeo Land and Water Company that those lots would be paid for, and they insisted that they were to be subdivided and sold. That plan was all worked out in advance. We expected to realize the money that way. There were hundreds and hundreds of lots. 77 acres is a pretty good sized property and would make a lot of lots. Yes, we were so fortunate that we actually sold enough lots in advance of the time when we had

(Testimony of Eugene Swarzwald.)

to make the first payment that we had the first payment from advance sales.

My obligation, this guarantee that the parents had signed of that $250,000, was there just the same. They sold enough lots to meet the payments as they matured. The Berkeley Hall School is still running the property that the parents acquired for it.

As to whether the sum of $10,000.00 was paid to bind the bargain in the acquisition of this property, yes, I think it was.

(A document containing a list of names with amounts after them was passed to the witness.)

Yes, I recall that transaction. I think Mr. Gilchrist handled it as a part of the deposit. I think there was a deposit made. I think I advanced about $500.00 towards making up the deposit, the required deposit, but no obligation whatever to purchase lots. It was earnest money. Earnest money for the consummation of the transaction between the Rodeo Land and Water Company and the parents of the school. I am quite positive that I did put [49] up that $500.00. No, it was not credited to me on my lot. Yes, I did get it back. Yes, it was all paid back, but it was not credited on the lot.

The testimony of

FRANK F. HILL,

in narrative form, was as follows:

My name is Frank F. Hill. I am a resident of Los Angeles. I have been in Los Angeles practically

(Testimony of Frank F. Hill.)

all the time since 1899. I am in the oil business. I am an officer of the Union Oil Company. I had one son in the Berkeley Hall School, probably along in 1922 or 1921, and another daughter coming up, but was not quite of school age at that time. In relation to the promotion or development of Berkeley Hall School in 1922 or 1923, a number of meetings were called, in which the parents attended, and as I recall it, there were committees or, a committee, appointed to investigate and devise means to expand the school and perpetuate it as an institution where Christian Science parents could send their children; and out of that came the purchase of a number of acres of land. I believe it has been testified to there were 77 acres selected out in Wilshire near Beverly, and a portion of that land was subdivided and sold off in town lots, and there was a portion of it set aside for the use of the school.

(A document was passed to the witness.)

Yes, that is my name. Yes, I signed such a document. I did sign the guarantee, two guarantees, as I recall it.

(Petitioner's Exhibit No. 1 was passed to the witness.) [50]

That is my signature, the third name on the list. As to when I signed it, I see the document is dated May 1, 1923. The guarantee was signed by a number of other people who were interested in the welfare of the school, the extending of it and the perpetuating of it, for the purpose of showing to the

(Testimony of Frank F. Hill.)

Rodeo Land Company the ability of the parents to support the school financially, to the end that this deal might be made. I signed it for the purpose of lending my aid in putting through a deal to secure some additional lands and funds to move and build a new school for the Berkeley Hall School, and I signed the paper as an evidence of my faith, and guaranteeing that I would support such a movement.

As to whether the Berkeley Hall School is a private institution or a corporation, I did not know the exact status of it, so far as its legal existence was concerned, until I heard it stated here today that it was a corporation. I had not known that before, if that is true. As to the form of organization I thought I was backing, it was my understanding that there were no schools attached directly to the Christian Science Church, and that we were perpetuating a school that had already been established, to which Christian Science children were admitted and that we were giving this land, or assisting in securing this land and these funds, to build an additional school for the purpose of perpetuating Berkeley Hall School, which I understood was to be used for Christian Science children.

[51]

I paid tuition for my children, it is not a free school in any way.

It was agreed by some committee, I guess, that the guarantors would be given first choice in picking

(Testimony of Frank F. Hill.)

lots in relation to the way in which their signatures appeared on the document. As to who handled this proposition and who had authority to sign it for them and enter into an agreement with the Rodeo Land and Water Company, I do not think I can answer that. My discussions largely were with Mr. Markwell and Mr. Gilchrist, and I think Mr. Rosenthal and two or three others that I cannot recall their names. We attended a number of meetings, but I do not just know the authority that was given these people. I had nothing to do with that end of it.

EUGENE SWARZWALD

was recalled to the witness stand. His testimony, in narrative form, was as follows:

As to the earnest money which I testified was paid to the Rodeo Land and Water Company, I think it was $10,000.00.

(Petitioner's Exhibit No. 2 for identification was passed to the witness.)

The $10,000.00 was paid after we signed this original document that the syndicate signed on which my name appeared third. By the original document I mean the document that we referred to in the early part of the testimony, that guaranteed the amount of money that the 77 acres would be purchased for. That document, or a document guaranteeing the purchase price, was taken to the Rodeo Land and

(Testimony of Eugene Swarzwald.)

Water Company. My [52] name appeared on it. There was a small sum raised from those parents who signed this original syndicate document as earnest money for either an option or for the purpose of binding the contract.

(Thereupon a letter dated April 30, 1932 over the signature of Frank Meline was admitted in evidence as petitioner's Exhibit No. 3, and was passed to the witness).

I am familiar with this document, that is the $10,000.00 to which I have just referred as being paid by the parents of the children of the Berkeley Hall School, as earnest money to bind the transaction.

I do not think the guarantee to which I affixed my signature was ever used after the payment of this money. It was used before, as evidence of faith in the ability of this syndicate to go through with the financial obligation in acquiring the 77 acres.

As to the last paragraph in petitioner's Exhibit No. 3 which reads: "In event satisfactory terms to both parties cannot be arranged within 8 days, then the $10,000.00 earnest money paid by the Berkeley Hall School, Inc., shall be returned to them", I know that satisfactory terms were arranged within eight days. The statement that the earnest money paid by the Berkeley Hall School shall be returned to them, was placed in there for the reason that the property was to be known as the Berkeley Hall

(Testimony of Eugene Swarzwald.)
School project. [53] None of this $10,000.00 came from the Berkeley Hall School to my knowledge. To the best of my knowledge it all came from the parents. The $500.00 I advanced was returned to me.

By the syndicate of which I speak I mean the group of parents. That is what I call a syndicate. We did not have any organization organizing ourselves into a syndicate, just a brotherly group. It had nothing to do with the church. A syndicate in my opinion, designated a group of persons with ability to do certain things financially. It was not organized as a corporation. We had no officers. We would telephone and meet just as officers would, if there were officers. To the best of my knowledge it is true that this $10,000.00 was paid by the parents. I know what some of the others paid, but I do not know what all of them paid. I got my money back on this guarantee. I do not remember how long after, but it was not very long. The whole deal in a few months showed considerable progress. I think I gave this money to Mr. Gilchrist.

Petitioner's Exhibit No. 3 says that this money was received from the Berkeley Hall School. No, I would not like to change that letter now. I do not know how the money was received. I just go by what is on the letter. To me it is immaterial whether it was received from the Berkeley Hall School or from Mr. Gilchrist. Our syndicate, or parents, had no formal organization. The parents formed an in-

(Testimony of Eugene Swarzwald.)

formal group. They had no legal status. We simply got together as a group of parents to help the Berkeley Hall School and we would not have gotten in back of it as we did if it [54] had not been a private enterprise. The only reason I can think of why the name Berkeley Hall School was used is that the Berkeley Hall School was established. It was known we were all interested in it. We had helped the school for years, financially and otherwise, and it was just an established entity.

If it had been a real estate promotion project we would not have done it as we did, in the way that we did it. We would not have gotten back of it the way that we did. I knew we were assisting a private institution, but we did not know we were going to make money out of it. In other words, we were not in the real estate business. We were of the opinion that we would make a profit. We expected to make enough out of it to build a school, but not to make a personal profit. We did not know that we were going to make a personal profit. We figured it out that we could give the school this acreage and help them eventually to move from their location to Beverly Hills, and that was our intention and our hope. Our object was not to make money on the purchase of these lots personally, although we did. [55]

The testimony of

LEILA L. COOPER,

in narrative form, was as follows:

My name is Leila L. Cooper. I reside in Beverly Hills. I have resided in Los Angeles and Beverly Hills about thirty years. During that time my profession has been teaching school. I am one of the founders and originators, principal, teacher and later president of Berkeley Hall School, Incorporated.

It was organized in 1911 as a private school. We had about 20 enrollments, 3 teachers. In 1912 we moved to Fourth Avenue. We found a place there that we paid $1,000 down and took $9,000 in mortgage notes. It was just a residence, and we erected temporary portable buildings on the lots, and acquired several adjacent lots. We made three moves, Western Avenue first, and then Fourth Avenue in the City of Los Angeles, then from Fourth Avenue we moved to Beverly Hills. The Fourth Avenue School was an old house which was remodeled, and we erected portable bungalows for schoolrooms, temporary buildings. I think we had considered the value of the property in 1923 about $25,000.00, and $13,000.00 mortgage. $12,000.00 was probably what we had in it. The buildings were badly depreciated at the time. After the war the adjacent land that we had used for play ground was built upon, and we were entirely surrounded with buildings. The principal and teachers in the school were Miss Mary Stevens, who was one of the officers of the Berkeley

(Testimony of Leila L. Cooper.)

Hall School since its organization, Mabel R. Cooper, who is my sister, and who [56] has been one of the officers since organization and myself. We three ladies have been the principal operators of the school and the owners of the corporation, and there is no stock except what is owned by us, and that has been the situation since its inception.

The school was incorporated in 1920 as a private educational institution. The acquisition of other property was prompted by the lack of playground, which was most urgent and we had to eliminate the older boys, from the sixth grade up, for lack of playground, and we should have had to have eliminated the girls of from perhaps the fourth grade up had we continued in that place. We could not have provided facilities for the older children.

We talked to the parents, many of them had helped us financially in small ways and knew that we could not, at the rate that property was increasing, hope to hold the school and acquire land; and as we talked with them about it, the suggestion came for the parents to get together and see what they could do.

They had several meetings just in a small group, Mr. Swarzwald and Mr. Markwell, who testified yesterday, being among those originally interested, and a few others who were interested temporarily. We talked about ways and means, and different committees were appointed, who went to different par-

(Testimony of Leila L. Cooper.)

ents, but it came back each time to the proposition of taking on interests. We had been struggling for so many years under that that we did not want to go [57] into the new project and bear the brunt of the interest, and we were at practically a standstill when one of our mothers came in and inquired —she had heard something of it. We had not asked her, nor her husband, because we did not know them. She went home that night and talked to her husband about it, and he was an experienced subdivider, and he came over the next morning and said we had one asset only, and that was the interest of our parents, which was a bankable asset. Of course, it seemed, as we said, too good to be true. We could not grasp it at that time, but we passed the word on to these other men, friends, who had been more closely interested, and they seemed to see the possibilities. And from that time on it went entirely into the hands of the parents.

They asked us to call the parents together, which we did, into a mass meeting. I would say 50 or 60 people came the first time, all of them were parents, and Mr. Swarzwald, I believe presided and he asked me to tell the parents what we had to do.

I gave a brief statement, and the fact that we had only one alternative, and that was to limit the school to the small children, and eventually to turn our property into income property or to have help in securing acreage and going out for a new school.

(Testimony of Leila L. Cooper.)

The support was beyond anything that we had expected, for we never had any occasion to know what the parents felt about the school. This was the first of three meetings. I believe then [58] that Mr. Swarzwald called on Mr. Gilchrist to tell, or he told, rather, in the beginning, of the plan that had been proposed.

There were many business men there who took it up immediately and offered to back it in any way they were needed.

The talk of another meeting was mentioned, and Mr. Caswell expected to be in San Francisco for two weeks, and he left a check of $2,000.00 to be used in case of anything needed before he returned. No money was raised in the meeting. I was speaking of the first meeting, about April 1923.

Immediately after this was explained to the friends assembled, someone went to the office and typed this agreement, which was signed there in front of the room where there was a large desk spread out.

(Petitioner's Exhibit No. 2 for identification was passed to the witness).

Yes, I have seen an instrument similar to that. April 13th is the first signature. This was the agreement signed at that time. The original of this agreement we thought went to the Government, because it is marked as Exhibit and was sent some years ago. It was a long time before those papers got to us. It was either sent to the Government

(Testimony of Leila L. Cooper.)

or given to the bank when we first went to the bank. I have searched our records and could not find it. I think all of that came back to us, and we just put it in a book, in a box. We cannot find the original. The agreement was signed that evening [59] and copies were made so that different friends could take a copy to their friends to secure more signatures. That is the reason for the typed copies. We have a number of typed copies, and the names of those who signed that night were typed, and then the names are written on—perhaps on that one or some others, of the new names, that were secured by different people.

We went to the bank after the plan was outlined. Mr. Gilchrist asked me to go to the bank and see if the bank would consent to act in the capacity of trustee, I believe. Mr. Monett, Ora Monett, had been our friend in all of our school enterprises. He had arranged the mortgages for us each time. He was president of the Bank of America, and knew the history of the school as far as banking was concerned. We went to him, and he said he was glad and willing to do anything necessary. That was a preliminary hearing, I would say. Later we took the list to him and showed him the names on that guarantee, and told him the plan as it had grown to consummation. I think he knew many of the men on this guarantee himself.

Mr. Monett sent us then to the trust officer, who was Mr. J. Randall. Mr. Randall was a Christian

(Testimony of Leila L. Cooper.)

Scientist and said he was interested in helping in any way that he could. He was also interested in having the type of people that this would bring to the bank in their new organization.

We had to show Mr. Monett that we had something before he would send us to Mr. Randall, because Mr. Monett knew—we had [60] consulted him many times about buying tracts of land. He had taken them up with the different boards in the bank, and we had been refused, because we had nothing to show that we had any backing, except our feeling that possibly somebody would help us.

There were three of them that I know of. One was practically ready for signature, and was turned down by the bank. This was the first time that we had any tangible evidence that we had a financial backing among our parents.

The first plan was to obtain the loan from the bank for the down payment. There had been no other plan thought of at that time, except to borrow the money. We had asked Mr. Monett for loans. That was the only way we could secure property, was to have a loan of the money to make a down payment. Mr. Monett said we had no assets, that the bank could consider worth a loan, because we already had a $13,000.00 mortgage on the property and it was not worth much more. We had to have a down payment on the land and we knew no way now of getting it, except through the bank. Mr. Monett

(Testimony of Leila L. Cooper.)

considered that the people who were back of this were sufficiently able to see the proposition through, anything that they would attempt. The amount of money, I think, was $135,000.00. It was estimated it would take that amount to make a down payment on any property that would clear enough to give the school ten acres of land. As to whether there was a second guarantee of $135,000.00 [61] entered into by the parents later I am not sure about the sum. They are stated on the different guarantees.

Mr. Randall was shown a list of guarantors, and he, of course, knew many of them and he said that he felt the plan was entirely feasible, and that he would accept those men as guarantors for anything that the bank was willing to loan. I did not have any other discussion with the bank or any other person of interest here, in relation to the guarantees, or either of them.

(A document was passed to the witness.)

Yes, Mr. Caswell's name is here. This is the $2,000.00 that I spoke of that Mr. Caswell left. On one Friday in the last of April Mr. Gilchrist telephoned that he had secured or could secure an option on a most desirable tract of land North of Wilshire, if he could have $10,000 by 12 o'clock, Monday morning. Mr. Caswell's check was with us, and we telephoned Mrs. Caswell, and she said she would try to get him by wire. She was not able to do this, because he was on his way between San Francisco and Los Angeles, and she telephoned

(Testimony of Leila L. Cooper.)

back that she knew the purpose for which he had left the check, and that she would leave it to our judgment. She hated to feel that it might be lost, but she could not withhold it, because she knew that he had left it to be used in an emergency. Mr. Payne, whose name is here, was also in San Francisco. The money was used for the payment. The people listed here were all parents or friends interested in the school or in Christian Science and as to the amount after their names, that money was taken to Mr. Meline at 12 o'clock—between 11 and 12 o'clock, Monday noon, to secure an option, an eight [62] day option for the sale of this Rodeo Land and Water farm tract. The sum is $10,000.00. That was earnest money in relation to the acquisition of this property. The amounts set opposite to the names of these people is the money that came from them. It was advanced by them. They understood that the need might be—that there might not be time for a mass meeting. That had been talked of, and those people had signified their willingness to help when they were needed. Mr. Payne was in San Francisco, and had to be telegraphed, and he telegraphed permission for his wife to use his name. These individual people advanced this $10,000.00. The Berkeley Hall School did not participate in this in any way. The officers or stockholders of the Berkeley Hall School did not advance any part of it. It is not in it in any way. These are all parents

(Testimony of Leila L. Cooper.)

of children in the school, or people directly interested in Christian Science.

(Petitioner's Exhibit No. 3 was passed to the witness.)

This is a letter signed by Mr. Meline wherein we were given eight days to arrive at terms. We were allowed eight days to raise the rest of the $90,000.00. That afternoon after we had made the deposit of $10,000.00, the land was subdivided on paper, in Mr. Gilchrist's office. The $10,000.00 was paid to Mr. Meline by Mr. Gilchrist, who was agent for the parents, the one whom they had appointed to carry out the details. The Berkeley Hall School did not pay any part of the $10,000.00 shown in this letter from Mr. Meline [63] which states at the top "Received of Berkeley Hall School, Inc., $10,-000.00." It was not funds of Berkeley Hall School. Berkeley Hall School had no funds.

In Mr. Gilchrist's office the land was subdivided on paper, and a blue print was made that night. The next day in his office the prices of the lots were put on them. There was something over 370 lots. On a Tuesday night the parents who had signed the original guarantee were invited to come to his office to select the lots in the order in which they had signed the first guarantee.

Yes, money was raised that first night, $64,000.00 was subscribed by these original guarantors. Within the eight days allowed under Mr. Meline's letter

(Testimony of Leila L. Cooper.)

the $100,000.00 was raised, by Saturday noon, I think. That was less than eight days. That was the first down payment to be made, of $100,000.00, and that was raised from the sale of lots to the parents of the children of the school. And then after that the project was carried right on to consummation. Mr. Gilchrist fixed the prices per lot on the subdivided tract. He said it was a tremendous job to be done in one day, even with a trained office force, and at 6 o'clock that night he had priced it too high. Before the meeting he repriced it, and worked up until the time of 8 o'clock, when these people assembled at the office. We, the Berkeley Hall School, knew nothing about it until that evening. We, the three of us, the Berkeley Hall School, were not interested in subdividing the land or marketing the property. I did not have any funds myself other than invested in the school, and no private credit of any kind.

(List of parents and amounts they subscribed to make up the payment of $10,000.00 admitted in evidence as petitioner's Exhibit No. 4.) [64]

Yes, there was a declaration of trust entered into with the bank in relation to this property and I signed it.

(A declaration of trust dated June 1, 1923, being Trust No. 109 with the Bank of America, received in evidence as Joint Exhibit A-1.)

Yes, there was a declaration of trust entered into with the Bank of America. As to whether we were

(Testimony of Leila L. Cooper.)

a party to the declaration of trust, we were to be the recipients of the land. It was through this instrument that the land was to be given to the Berkeley Hall School. As I understand it, there had to be some legal way of going at this subdivision, and we signed or did what we were told to do. The understanding was our only interest in it was we were to be given the land. The detail and the way in which it was to be done was far beyond my comprehension then, and it is now.

I did not know then what the instrument contains. There were only eight days, and this had to be executed seemingly in a very short time, and I merely followed Mr. Gilchrist's suggestions and signed what we were asked to sign. The Berkeley Hall School at no time bought this land. We did not enter into any transactions to buy it. We did not pay, as this instrument indicates on the bottom of page 1, the sum of $100,000.00. We did not pay any part of it. Neither the Berkeley Hall School nor any of its stockholders paid any part of it. We did not have anything at that end of the year, but just enough to get us through the summer. We could not pay anything at all. The name Berkeley Hall School was used in here just as a matter of convenience. [65] There was nothing else to use that anyone knew anything about. It was merely a matter of some name having to be used in the document.

The Berkeley Hall School has never declared a dividend. We have received donations from time

(Testimony of Leila L. Cooper.)

to time from people. Since our first inception we have had small sums. These last few years they have been larger. In 1921, 1922 or 1923, the school was not operated at any profit, to speak of. The money went back into—we carried mortgages from the beginning. The money all went back into the school, to defray the interest,—and to take on more land as fast as we were able—for accommodations, I should say.

As to whether the school received money and acreage as the result of this transaction, it was in trust in the bank. The school never received it, except as it was transferred from one account to another. The accounts were kept in the bank in an entirely separate account from our own school account. This transaction never appeared upon our school books. As to whether the land has been transferred to the school from the bank, it was taken from the Bank of America to the Citizens First National Bank, and at that time it was not deemed advisable to continue the trust, because of the expense, so the deed was taken out and placed in the name of the school, when it was transferred from one bank to another. That was in 1927 or 1928. Up until the year 1927 or 1928 the Bank of America still had title to this land. It was in trust in the trust department of the bank under Mr. Randall. [66]

In 1925 we started the buildings, after the subdivision was complete. It was a year before the subdivision was complete. In 1925 we moved the

(Testimony of Leila L. Cooper.)

school, and the money that was in the bank was checked out to the architect from that fund, which had been placed in our checking account, transferred by the trust department to a checking account, for the building of the school building, and the grounds. Neither the Berkeley Hall School nor its officers or stockholders ever received any of this money for themselves.

The school is still operating. We have not at any time exercised dominion over the school property as owner. We are holding it in trust. That was our understanding from the beginning, that the property was to be held in trust and to be perpetuated.

Well, the entire intent of the operation was to secure grounds to perpetuate the school, so that it would not be a personally owned institution, and that has been the thing we have worked for all these years. Otherwise, it would have been—the property, had it been ours, if it would have been sold, would have been much easier for us to have sold, but it was not given to us personally, but to us to carry on the school for the children of these people who took entirely the financial responsibility. We have made efforts to have it perpetuated. Before we started the buildings, we called Douglas Edmunds. He was familiar with the entire operation, and he gave us several papers worked out in a way showing how this land might be perpetuated. At [67] that time there was this undecided case of putting the private schools below the high school out of existence. That

(Testimony of Leila L. Cooper.)

was later carried to the Supreme Court, but it was several years after this that that was eliminated from our problem. At this time Judge Edmunds said that the property, if the school was ever discontinued for any reason whatsoever, would go to the state. We felt that a group of Christian Scientists had done this for an educational purpose, and should the school be discontinued, the property or money in future years should go to the Church, or to some other similar institution.

After this we formed an advisory board, of which Douglas Edmunds was a member, and it was presented later to our Dads Club, which was an organization for helping in the business problems by advice to the school, and they formed—they authorized two lawyers, who were members of that committee to work out a deed, a deed of trust, in which the land might be perpetuated and the school continued indefinitely.

There was an effort made to deed the property to the Christian Science Church. Judge Edmunds went to Boston. He was then an employee or representative of the Christian Science Church in this field. He went to Boston, and we have had considerable correspondence with Mr. Norwood, who is the head of the Committee there that would have in charge donations of property, and the Church did not want to be a partnership in any school or any other business. If the property were sold and turned over to them, they would accept the money, but

(Testimony of Leila L. Cooper.)

not at this present state. The Christian Science Church had no way [68] of connecting itself with an educational institution and could not accept the property.

The deed to the property is now in trust in the Title Guarantee and Trust Company of this city. We have a board of seven members, counting ourselves, who are holding this land for perpetuation, and when the mortgage is lifted there is no further problem. We now have a mortgage on the property totaling $123,000.00. That money was borrowed and put into buildings on the property. I refer to the land and buildings on the ground.

More than one site was considered in the spring of 1923. South of Wilshire was cheaper, and our first thought was for the land that was the cheaper section. And that was raised, and the other property was considered far more advantageous, but it was not on the market when we began the discussion. The officers and stockholders at the school had nothing to do with the selection of these sites. We were not considered at all in the matter of the selecting of the present site.

The Carthay Center site was considered in the very beginning, before we had the mass meetings, when we had just the small groups. Mr. Swarzwald went to the Hellman Bank for that.

(A document, purporting to be an enrollment application blank of the Berkeley Hall School, was passed to the witness.)

(Testimony of Leila L. Cooper.)

This is the form we require of the parents. The parents must be students of Christian Science, and we ask a recommendation of two practitioners, and the attendance of the child in a Christian [69] Science Sunday School before a student is accepted in the school. There are no other requirements.

The Berkeley Hall School did not install the water mains or make any improvements, or enter into any agreements in relation to the matter of the subdivision or marketing of this tract. Mr. Gilchrist handled that. Mr. Gilchrist was not our agent. He was appointed in the first meeting, at the first mass meeting, by the parents. He did all the selling of the lots. At the first meeting, when the plan was proposed, the parents said, "Who could carry it out?" And Mr. Gilchrist said he had done so much subdividing he hoped he would not have to do any more. Before the meeting was over he agreed to do this for the parents, as one of the parents, for a small fee, and he agreed there to that, to carry that entirely through to the subdivision, the water and everything that pertained to that subdivision. Mr. Gilchrist was appointed by them at the first meeting. Yes, they had authority to create him in that position. They had the authority of a group of people who had agreed upon a certain line of procedure. The authority to sign documents, and things of that kind was given to him that night—as to whether I think the authority can be transferred that way, well it was. When we, Miss Stevens, my

(Testimony of Leila L. Cooper.)

Sister and myself, first started the school back in 1911 we rented. At that time we had $300.00. We started taking in Christian Science pupils and teaching them. We outgrew those quarters in two years. In 1920 when we organized the corporation Miss Stevens, Mabel Cooper and [70] myself each owned one-third of the stock. No one else owned any of the stock. We have on our books $100.00 a month as salaries paid to each of us, but we have never taken it. From the beginning we have been buying more property and paying off mortgages with the income from them. Finally we come down to 1923, when we were about desperate and about to give up the school, and we told them if something was not done we were going to rent out our property and live on the income.

Under the first proposed plan we took these written guarantees to the bank for the purpose of borrowing the $100,000.00 to make the down payment. We did not need to borrow that money from the bank after the option was obtained. The only money that was put up was this $10,000.00 that a few of these parents put up and was paid as a binder on the option. The way that money was repaid to these men was that most of them bought lots, but not all of them. I do not know whether those who bought lots were given credit for the money they had paid in. Getting first choice on the lots was the reward which the guarantors got. The first signer getting

(Testimony of Leila L. Cooper.)

lot No. 1, was their reward. The guarantors, other than the men who put up the $10,000.00 had agreed to put up money, but we did not use it, we did not need it. We did not sell more than enough lots before the eight days were over to raise more than $100,000.00, the parents bought the lots for that purpose, for the purpose of raising money, not for any other purpose, however. We helped in every way that we could to sell the lots at that time. The purpose was to get together and sell the lots not only to the guarantors, but to the guarantors' friends. And we put it over and sold the lots within a very short while. [71]

I did not say I went down to the Bank of America to sign this trust agreement. I said I signed it. It was probably brought to us.

After the bank took over the handling of the matter our work in connection with it was to do only what we were asked to do. We were teaching school every day from 8 to 6. There was a plot at the school office for convenience, and Mrs. Gilchrist was there in charge.

As to the use we made of the signed guarantees, we had no way of getting to the trust officer of the bank without something to show. We used the trust officer, because it went into escrow in that trust. We did not need to borrow any money at all.

The money from the trust was in the hands of the bank and was put into a separate account, as

(Testimony of Leila L. Cooper.)

Mr. Gilchrist requested the money for the subdivision purposes. The $38,000.00 was taken out on October 1st, for the beginning of the subdivision work. The money for the purposes of putting in the streets and the alleys and sewers and all those things had to be checked to the building and improvement fund, and then it had to be countersigned. The checks for these improvements were probably signed in the name of the Berkeley Hall School. We received a deed from the trust officer, or the Rodeo Land Company, whichever it was, for the land that was left. I have that deed.

(The witness examines a document.)

Yes, this is the deed which we received from the trust company, Bank of Italy. [72]

(The document is received in evidence as respondent's Exhibit A.)

This is the deed I referred to in my testimony of awhile ago when I said it was given to us in trust. I said I did not know whether all of the men who put up the $10,000.00 bought lots. I do not remember now that all of them bought lots. Most of them, I know, did, because I have been in contact with them since. I do not remember whether or not I returned any of the money. It was before we built the buildings, in 1923 or 1924, that we consulted lawyers about placing this school property in trust or transferring it to the church. We sold the lots in the spring of 1923. There were still six months in the year. The down payment on all of the lots was made in 1923, but they were sold

(Testimony of Leila L. Cooper.)

on the installment plan. We started building the buildings in April, 1925. At that time sufficient money had been transferred to the account of the Berkeley Hall School to start the buildings. At that time we did not have the $84,000.00 in cash that was turned over to us. There were three installments running over eighteen months. The money was not all in. I believe the lots were sold on three payments, six months each.

As to whether this lot was deeded to us clear of debts, there was a loan already taken out while the property was in trust, for the finishing of the original four buildings. The loan was taken out in the name of the Berkeley Hall School. I think the loan was $50,000.00. We took out a loan of $50,000.00, I believe. I do not [73] know whether we gave a trust deed on that property. It was in trust. I would be one of the signers to the papers for the Berkeley Hall School for that money. As to how long it was after that before we started to see whether or not we could place it in the church, that arrangement was carried on by an advisory board which met every month or six weeks for a period of years. I could not be sure of dates. It was a continuous—a board that was continuously on call and at every new development we had a meeting. As to who appointed the board, I would say that we helped to select them. Judge Edmunds was the one who had made the first attempt, and because of his position in the church work he was not able to go on with

(Testimony of Leila L. Cooper.)

the legal work. We did not know where else to go, and it was merely carried as the Advisory Committee work for a period of two or three years. They represented a group of people who were interested in carrying on what the first group of people started. These people were not lot buyers. There were three practioners, one architect and Judge Edmunds. They had not put any money in it. And none of the guarantors had put any money in it except for the purchase of lots. The trust sold all of these lots and made a profit of $122,000.00. They turned over the property and $80,000.00 to us. As to whether they made a profit of $122,000.00 on the sale of these lots, well, I do not know. The records are all that I have for that. So all of the property had been paid for, including the lot which we got and they turned over to us what was left and we have used it to build buildings on the lot. The title at the present time is in the Title Guarantee and [74] Trust Company. I mean to say that the title now is held for this board of which we are members. We have a board of trustees. We three are members of that board and the property has been placed in the trust, Title Guarantee Company, I believe. That trust is not for the payment of money that we borrowed, it is there for perpetuation. Two or three years ago we started just at the time of this depression to ask our friends to complete the thing that they began, and that is to raise a mortgage and to put this land and buildings free

(Testimony of Leila L. Cooper.)

of all encumbrances for perpetuation. The mortgages have been or were upon the buildings that were being built.

The property was deeded to us. We borrowed money on the trust before it was deeded, while it was in trust in the Bank of America. The Bank of America loaned us money that way.

We have been attempting all the way through to place the property in hands to perpetuate the school, to find a way to do that. We have found the way now. As to whether we have done it, we could not.

The $84,000.00 was in the bank until it was needed for subdivision. The subdivision work was all complete before we received anything. Whether it was all turned over to us at one time or was turned over from time to time, I do not know. The Berkeley Hall School checked the money out for expenses for the building fund.

As to my testimony that not any of the guarantors advanced any money except for the purchase of lots, they also advanced earnest money. That is $10,000.00 was advanced by parents of children of Berkeley Hall School, and the lots had nothing to do with that at all. [75] The purchase of the lots was something subsequent to that. They were granted the right to purchase in the order in which they signed the first guarantee document. They were given preference in that order. I do not know whether this $10,000.00 that was paid as earnest

(Testimony of Leila L. Cooper.)

money was credited on the lots or later was paid back to those people who advanced it.

Prior to this time we took property with the help of the bank, in the old location, that is, on Fourth Avenue, and carried the mortgages on it. The only property we have ever dealt in was just merely for the purposes of our school there. Right in that one place. Just to expand the school.

The pupils attending our school pay tuition. At this time it was $100.00 a year.

The testimony of

JAY E. RANDALL,

in narrative form, was as follows:

My name is Jay E. Randall. In 1922 or 1923 I was vice president and trust officer of the Bank of America in Los Angeles. As such officer I had conferences with people interested in the Berkeley Hall School or parents of children attending the school in relation to the establishment of a trust and the purchase of land. I think that was along in 1923. The first conference in relation to the Berkeley Hall School was in relation to a trust being placed in the trust department, a subdivision trust for the Rodeo Land and Water Company. [76] There was property being purchased from the Rodeo Land and Water Company. I was first approached in regard to it by Mr. Monette as I remember it. He was president of the bank. And he

(Testimony of Jay E. Randall.)

said that the Berkeley Hall School was attempting to find a new location and had an opportunity to acquire some land from the Rodeo Land & Water Company in a way which would get them their new location through the cooperation of parents and people who were interested in the school, and wanted to know whether it was a practical proposition to take the trust and handle it in there to protect all parties. I believe Mr. Gilchrist was present at that time representing the people who were interested in putting the project through. There was a loan contemplated, as I remember it now. There was a loan contemplated, making a loan to a group of people who were the ones who were backing the project. I do not remember who they were, but there were a great number of them, as I remember it; a great many were backing the project, people who were interested largely in having such a school as that in Los Angeles. I told Mr. Monett that we could not go ahead without a guarantee from all those people; that we could not take it as an ordinary subdivision trust placed there, because it would be necessary for us to have the guarantee of everyone who was interested in it in order to protect the Rodeo Land and Water Company as well as the lot purchasers. That was always customary. It was a general requirement in trust company moneys. We were furnished the guarantee. I do not remember how many names were on it, but it was—all I can remember is it

(Testimony of Jay E. Randall.)

was quite a lengthy document, quite a [77] lot of names signed on it. I think that at that time the list was turned over to the Credit department for the purpose of checking, because a loan was contemplated.

(A document was passed to the witness.)

As to whether this is the guarantee which was exhibited to me, well, it is so long ago that I could not say for certain, but I think, to the best of my recollection, that is the guarantee, or one similar to it. We consider the signers of the guarantee were financially responsible. That investigation, I think, was made of them by the Credit department of the bank.

The property was conveyed to us by the Rodeo Land and Water Company, as I recall it, and during the time that we were having the title brought down on it, and having the title perfected in us, the entire tract—it seems to me it was entirely sold out. If not *not* entirely sold out, all but one or two lots. They came in with the contracts for the sales. Mr. Gilchrist brought them in before we had the title entirely completed in us.

A loan was contemplated at the time or just prior to the exhibiting of the guarantee to me. The making of the loan of $100,000.00 to them was contemplated by our bank. I believe the loan was not made. I believe it was not necessary. As I recall it those lots all being sold out, sufficient money came in before it became necessary to make the

(Testimony of Jay E. Randall.)

payment to the Rodeo people. Sufficient money came in so they took care of the initial payment from that, as I recall it. I think our [78] bank agreed to make the loan of $100,000.00, if it was necessary, as I remember it.

The plan as outlined to me, and as I remember it now contemplated providing several acres of land for them to build a new school. They were crowded where they were and the idea of the people who were behind it apparently, was to acquire a new site for that school and provide some funds to erect a new school so that the school could expand.

We considered it as a religious semi-charitable proposition, and only charged them, as I recall it, one-third of the regular fees, just enough to carry out the regular work.

This guarantee was not brought to us for the purposes of the loan only. We required that there should be in the trust department. The loan was negotiated through Mr. Monett. It was submitted to me as such officer that we accept the trust. I did not think it was right to accept the trust without a guarantee from the people. What the object of the guarantee was for, I do not know, but we could not accept the trust without a guarantee from the parties in interest.

We have a liability to the parties to whom we sell property on contract, to deliver the deed when they make their final payments. How we could hold a man signing a guarantee like the one I looked at there in that kind of a transaction, I do not know,

(Testimony of Jay E. Randall.)

other than that if we wished to hold them responsible for putting up the money before we created the trust of $135,000.00, or whatever it was that that provided for. We never used that guarantee, never had any occasion [79] to use it. We never made the loan, as far as I recollect. As far as I remember we did not make them that loan.

I believe the lots were all sold out but one or two before we even got the title examined. My recollection is—— I handle a number of subdivision trusts and that stands out very definitely. That was one trust where it was sold out before it even started. The selling was all done by Mr. Gilchrist. I do not know how he was appointed. I know he was not appointed by us. Our negotiations were all with Mr. Gilchrist. I did not know in what capacity the school was being operated, whether it was a partnership, a corporation or what it was. I may have known that they were a corporation, I do not remember. I probably would look that up before making them a loan; but I was not the one making the loan. The object in reducing our fees in the trust department was because we were interested in having such a school in Los Angeles. We were all interested in having that school go ahead.

I knew that the school was devoted to Christian Science. The matter was handled in the Bank of America. I do not remember what the profits were that we made out of the transaction. It was under my jurisdiction, but I did not personally handle the trust .[80]

The testimony of

R. F. STEWART,

in narrative form, was as follows:

My name is R. F. Stewart. I am assistant trust officer of the Bank of America, National Trust and Savings Association. I have charge of the records and files in the various trusts. I have searched the records in relation to Trust Number 109 that was created with the Bank of America on June 1, 1923 in accordance with the subpoena duces tecum that was served upon us. I have found certain trust records but not the escrow records which I was subpoenaed to bring in. We found nothing in relation to the escrow and nothing in relation to the guarantee that was put in the escrow.

LEILA L. COOPER,

was recalled to the witness stand; her testimony, in narrative form, was as follows:

(Witness is shown petitioner's Exhibit No. 2 for identification.)

The original of this document was signed at the first meeting and was used then by Mr. Gilchrist and perhaps Mr. Swarzwald in going to different people to show what was done. It should be in our file, and the reason I thought it might have been sent to Washington is because it had been on one of these typewritten copies marked Exhibit something. It might have been left with the Rodeo

(Testimony of Leila L. Cooper.)

Land and Water Company, as evidence that those people were back of it. [81] It was not considered valuable in as much as the second one superseded it as a definite company. The first one was made merely as a guarantee that these people would back any collection of money. After the Rodeo Land and Water Company had been talked of, it was thought best inasmuch as the money had changed in amount and the company was definite, to execute a second paper.

As to whether the original of the document was not sent to and kept by the Bureau of Internal Revenue, our secretary at that time did all of that work under the direction of the person who was handling this case, and personally I did not send the paper; but it is marked on one of these copies as an exhibit. I do not know where the original is. We have made every effort to locate the original.

(The document, which has up to this time been referred to as petitioner's Exhibit No. 2 for identification, was at this point admitted in evidence as petitioner's Exhibit No. 2, over respondent's objection.

(Notice filed with the Bureau of Internal Revenue by the Bank of Italy under Section 704(b) of the 1928 Revenue Act offered and received in evidence as respondent's Exhibit C.)

It is stipulated and agreed by the parties that the Berkeley Hall School in its income tax return

for the year 1925 reported none of the income arising from the trust. [82]

The exhibits are as follows:

Petitioner's Exhibit No. 1.
Petitioner's Exhibit No. 2.
Petitioner's Exhibit No. 3.
Petitioner's Exhibit No. 4.
Joint Exhibit A-1.
Respondent's Exhibit A.
Respondent's Exhibit C.

The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, as attorney for the Commissioner of Internal Revenue.

(Signed) ROBERT H. JACKSON,
Assistant General Counsel for
the Bureau of Internal Revenue.

[Endorsed]: Lodged Dec. 5, 1935. Filed Jan. 22, 1936. [83]

[Title of Court and Cause.]

ORDER.

AND NOW, January 22, 1936, pursuant to notice of lodgment of statement of evidence for the petitioner on review in this case, service of which notice and copy of the statement of evidence having been accepted on January 11, 1936, by Ralph W. Smith, attorney of record for respondent on review, no

objections having been filed to the lodged statement of evidence, and the respondent on review, Berkeley Hall School, Incorporated, not being represented, having been regularly called from the Day Calendar on January 22, 1936, on motion of counsel for the petitioner on review, Commissioner of Internal Revenue, the premises considered, it is hereby

ORDERED, that the statement of evidence for the petitioner on review heretofore lodged be and the same is hereby approved.

[Seal] (Signed) J. RUSSELL LEECH,
Member.

Washington, D. C.
January 22, 1936. [84]

PETITIONER'S EXHIBIT 1.
(Admitted in Evidence Sep. 26, 1933.)
[Insignia.]
United States of America
TREASURY DEPARTMENT
Washington

September 10, 1927.

[Illegible] to Section 882 of the Revised Statutes, I hereby certify that the [illegible] true copy of Agreement of signers for Berkeley Hall School, dated May [illegible] in re: Christian Science School, Beverly Hills, California, the [illegible] of which are on file in this Department.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[Illegible] of the Secretary:

[Seal] F. A. BIRGFELD
Chief Clerk,
Treasury Department. [85]

Los Angeles, Cal., May 1, 1923.

The undersigned hereby agree to be one of fifteen or more signers to a guarantee to the Rodeo Land and Water Co., of Beverly Hills, Cal. This guarantee not to exceed One Hundred Thirty Five Thousand Dollars ($135,000.00) for improvements on tract and to be secured by about seventy two acres of land in Los Angeles County in the Beverly Hills district as outlined this day at a meeting held at Berkeley Hall School. Said guarantee to become null and void after the sum of Three hundred thirty five thousand dollars has been paid to the Rodeo Land and Water Co., on the property.

L. F. Caswell, 2892 Sunset Place
A. L. Markwell, 2115 5th Ave., Limit of Liability $10,000.00
F. F. Hill, 1525 So. Van Ness Ave., L. A.
M. L. Graff, Cal. Club
Arthur E. Dubrow, 4978 Melrose Ave.
Bernard Rosenthal, 2381 W. 23
M. M. Gilchrist, 729 Black Bldg.
C. A. Larson, 256 Arden Blvd., Limit of Liability $5000.00

Harry L. Bailey, 209 So. Dillon St., L. A. $2000.00
Mrs. C. R. Baxter, 8090 Mesa Drive $10,000
F. E. Mergenthaler, 4327 La Salle
William Stephens, 334-5 Security Bldg. $1,000.
Mrs. Grace D. Geldreich, 1006 S. Alvarado $2000
A. E. Wright, 2117 8th Ave. $1000
Mrs. Julia S. Caswell, 2892 Sunset Pl.
A. A. Dittriek, 623 No. Gramercy Place $2,000
H. J. Ulch, 4300 La Salle Ave. $5000.00
E. D. Williams, Lane Mortgage Bldg $1,000.00
Ada H. McClung, 982 Sanborn Ave. $1,000
J. C. Sayers, 5906 Willoughby Ave.
Mrs. Hugh Rennie, 1000 Grand View $1000.
Murray Hawkins, 2628 Ellendale Pl.
J. T. Fitzgerald, Liability limited in said guarantee to $5000.00
Geo. W. Possell, 1122 So. Grand View St.
Joseph W. Rosenthal, Mrs. Mary Young, 1231 Orange Grove, Holly.
Harry A. Rosenthal, 153 S. Larchmont Blvd.
Mrs. A. Rosenthal, 153 S. Larchmont Blvd.
Fred Burkhart, 636 S. Broadway
Henry I. Beller, 636 S. Broadway
Paul Paine, 607 Park View Ave. $5,000
Neil B. Sinclair, 716 S. Manhattan Place [86]

PETITIONER'S EXHIBIT 2.
(Admitted in Evidence Sep. 27, 1933.)

Los Angeles, California,
April 13th, 1923.

We the undersigned hereby agree to be one of twenty or more signers to a guarantee to a certain Bank or Trust Company in Los Angeles, Cal., to be selected by Berkeley Hall School. This guarantee not to exceed Two Hundred fifty Thousand Dollars ($250,000) and to be secured by fifty or more acres of land in Los Angeles County in the Beverly District as outlined at a meeting held this day at Berkeley Hall School.

1. A. L. Markwell, 2115 5th Ave., 1 lot.
2. M. M. Gilchrist, 729 Black Bldg., 1 lot.
3. Eugene Swarzwald, 732 Camden Drive, Beverly Hills, 5 lots.
4. Bernard Rosenthal, 2381 West 23rd St., 5 lots.
5. Neil B. Sinclair, 716 So. Manhattan Place, 2 lots.
6. L. F. Caswell, 2892 Sunset Place, 3 lots.
7. J. B. Fullerton, 696 So. Bronson Ave., 2 lots.
8. Horace Boos, 535 Plymouth Blvd.,
9. F. F. Hill, 1525 So. Van Ness Ave.,
10. Paul Paine, 607 Park View Ave., (Liability not to exceed $10,000) 2 lots.
11. W. W. Wilson, 739 So. Oxford.
12. William Stephens, 2136 5th Ave., 3 lots.
13. Chas A. Larson, 256 Arden Blvd., L. A.
14. J. T. Fitzgerald, 727 So. Hill St. (Liability not to exceed $5000).

15. Harry A. Rosenthal, 153 So. Larchmont Blvd., 2 lots.
16. Joseph W. Rosenthal, 1231 Orange Grove Ave., Hollywood, 2 lots.
17. Mrs. Mary Young, 1231 Orange Grove Ave., Hollywood, 2 lots.
18. Henry I. Beller, 3065 Leeward Ave., 2 lots.
19. Fred Burkhart, 3rd Floor Orpheum Bldg., 2 lots. [87]

PETITIONER'S EXHIBIT 3.
(Admitted in Evidence Sep. 26, 1933.)

THE FRANK MELINE CO.
Incorporated
Realtors - Subdividers - Builders
Loans - Insurance
Main Office
Entire Third Floor Sun Building
S. E. Corner Hill and Seventh Sts.
Phone 606-35
Los Angeles, Calif.
April 30, 1923.

Received of Berkeley Hall School, Inc., $10,000.00 as earnest money and part payment to apply on the sale of a certain 72 acres owned by the Rodeo Land and Water Company, bounded on the south by Wilshire Boulevard, on the west by Doheney Drive, on the north by the Los Angeles Pacific Railway Right-of-way, and on the east by Pruess Road, upon terms to be agreed upon by both parties. Purchase price to be $6,000.00 per acre, with payments as follows:

$75,000.00, or more, cash; $10,000.00 of which re-

ceipt is hereby acknowledged; $75,000.00, or more, in 6 months. Balance to be paid in three equal payments, or more, twelve, eighteen and twenty-four months after close of escrow. All deferred payments to bear interest at 6%.

The Rodeo Land & Water Company is to have permission to remove all their buildings from the premises within 90 days.

It is understood between both parties that the measurements of this land are figured from the center of the streets, and to be figured as gross measurements and not net.

In event that satisfactory terms to both parties can not be arranged within 8 days then the $10,000.00 earnest money paid by the Berkeley Hall School, Inc., shall be returned to them.

FRANK MELINE. [88]

PETITIONER'S EXHIBIT 4.
(Admitted in Evidence Sep. 27, 1933.)
Exhibit "C"

L. F. Caswell	$2000.
Paul Paine	1000.
A. L. Markwell	1000.
Wm. Stephens	1000.
Mr. Van Allen	1000.
Bernard Rosenthal	1000.
Eugene Swarzwald	500.
C. A. Larsen	500.
Mrs. Hugh McClung	500.
Mrs. Grace Geldreich	500.
E. D. Williams	500.
Mrs. Ida Stevens	500.

The above made first payment of $10,000. [89]

EXHIBIT A-1.

DECLARATION OF TRUST.

THIS DECLARATION OF TRUST, Made and executed at Los Angeles, California, this 1st day of June, 1923, by the BANK OF AMERICA, a corporation organized and existing under the laws of the State of California, with its principal place of business located in the City of Los Angeles, County of Los Angeles, State of California, hereinafter designated TRUSTEE,

WITNESSETH:

THAT WHEREAS, the RODEO LAND & WATER COMPANY, a corporation organized and existing under the laws of the State of California, hereinafter designated TRUSTOR, has by grant deed transferred and conveyed unto the Trustee all that certain real property described as follows:

> Lot Seven (7), Tract Number 3613, in the city of Beverly Hills, State of California, as per map recorded in Book 38, Pages 65 and 66, Official Records of Los Angeles County; and

WHEREAS, the Trustor has agreed to sell and convey unto the BERKELEY HALL SCHOOL, a corporation organized and existing under the laws of the State of California, hereinafter designated BENEFICIARY, the aforesaid property on the basis of the purchase price of Six Thousand ($6000.00) Dollars per acre, there being Seventy-seven and three hundredths (77.03) acres more or

less in said tract to be computed by proper survey and including the property to the center line of adjoining roads, there being a total estimated purchase price thereon of the sum of Four Hundred Sixty-two Thousand One Hundred Eighty ($462,-180.00) Dollars; and

WHEREAS, the said Beneficiary on account of said purchase price has paid to the said Trustor the sum of One Hundred Thousand ($100,000.00) Dollars, collected on proposed sales of property hereunder receipt whereof is hereby acknowledged by the said Trustor from the said Beneficiary; and

WHEREAS, the more readily to dispose of said properties, same has been platted and is to be sold in lots at a release price to be agreed upon and [90]

WHEREAS, it is the intention of this trust that the said properties be so sold and the said purchase price be paid from the collection of sales prices thereof, when and as the same is collected, the money to be applied in the manner as hereinafter set out; and

WHEREAS, the said Trustee has paid no consideration for the conveyance to it of the properties hereunder, other than the agreements herein contained;

NOW, THEREFORE, the said Trustee does hereby certify and declare that it holds and will hold the said property in trust under the terms and conditions, and for the uses and purposes set forth in this Declaration of Trust.

ARTICLE ONE.

Scope of Trust.

1. To secure the payment of the purchase price due the Trustor from the Beneficiary and the balance hereunder thereon in the sum of Three Hundred Sixty-two Thousand One Hundred Eighty ($362,180.00) Dollars, more or less, according to the acreage hereunder as follows:

On or before January 1, 1924, $100,000.00;
On or before July 1st, 1924, 87,393.34;
On or before January 1, 1925, 87,393.33;
On or before July 1st, 1925, 87,393.33;

more or less according to the acreage above provided.

2. To secure to the Trustee its fees, commissions, expenses and advances under the terms of this Declaration of Trust, for the purpose of selling, disposing and converting into cash, to the account of said Trustor and said Beneficiary hereunder, the trust properties covered hereby, and to distribute the proceeds thereof, as herein provided.

ARTICLE TWO.

Duties of Trustee.

The Trustee hereby agrees that it will, for the purpose of carrying out the terms and conditions of this trust, do and perform all necessary things for that purpose as follows: [91]

1. Subscribe to a subdivision map of the aforesaid property, when and as requested by the Beneficiary after the same has been approved by the

Trustor, and shall sell the said property and convey the same to purchasers at such prices and upon such terms of sale as it may be directed to do by the said Beneficiary, except that until all of the indebtedness due the Trustor hereunder has been fully paid, together with any advances made by said Trustor for the benefit or protection of the Trust Estate, no conveyances or contracts of sale shall be made, or any of said property sold at a price less than that set forth as a minimum sales price contained in the schedule marked Exhibit "A", hereto attached, hereby referred to, and made a part hereof, for each lot covered by said conveyance or contract of sale, and upon terms of payment satisfactory to the Trustee, but any conveyance made by the Trustee shall vest in its grantee a good and unassailable title free and discharged of its trust without any obligation on the part of the purchaser to see to the application of the money, provided that all conveyances and contracts of sale shall have, and contain therein, conditions, restrictions, reservations and limitations as to use of said property, as contained in Schedule "B", attached hereto, hereby referred to, and made a part hereof.

2. All moneys from the sale of lots shall be paid to and received by the Trustee, and applied by the Trustee as follows:

(a) Until the purchase price due to the Trustor hereunder shall have been paid, there shall be set aside and paid over to the said Trustor by the Trustee from all funds received by it from the sales

of property, not less than sixty (60) percent of the gross receipts thereof, payable in lots of $1000.00 or more, same to be applied by the Trustor upon the said balance of purchase price due on said property from the said Beneficiary;

(b) Forty (40) percent of said gross receipts shall be set aside for the purpose of defraying of expenses of this trust and [92] of the subdivision of said property, including the commissions and expenses of sale thereof, and which funds shall be subject to the order of the Beneficiary for this purpose, provided that such of said funds as are not thus necessary for said purposes shall be allowed to accumulate and be applyable at any time at the option of the Beneficiary to the balance of purchase price payable to the Trustor hereunder.

3. To accept and act upon the instructions of M. M. Gilchrist relative to the supervision and (in-improvement
vestment) of the said property under subdivision map as hereto attached, hereby referred to and made a part hereof, he being hereby retained by the Trustor and Beneficiary to supervise, manage and handle the placing of the subdivision improvements of said property and to manage and operate the sales relative thereto. That as a consideration of the said management of the operations and handling of said subdivision, and the sales thereof, the said M. M. Gilchrist shall receive from the Trustee, payable as and when the moneys are received under sales, a commission of five per cent (5%) on the gross sale price, of which three and

a half (3½) per cent shall be paid from the first moneys paid by the purchaser on the sale of such property as may be sold hereunder during the term of this trust, and ¾ of 1% from the twelve (12) months' payment and ¾ of 1% from the eighteen (18) months' payment, which said commission shall be payable from the aforesaid forty (40) per cent.

4. To execute all contracts of sale and deeds for individual parts or portions of the whole of said demised property, in such form and on such terms as may be approved by the said Beneficiary; containing therein the aforesaid restrictions and reservations, provided, however, that the form and conditions of said sales contracts and deeds shall be satisfactory to the Trustee and the said Trustor.

5. To enforce the terms, conditions and penalties including the cancellation for default by action or suit, of the various and several contracts to be executed by it, as authorized hereunder, the costs and expenses of which are to be borne by the said Beneficiary and payable from the said 40% of the gross receipts. [93]

6. During the term of this trust said Trustee shall not be required to procure or maintain any insurance upon any buildings on said property, or to pay or secure the payment of any liens, encumbrances, taxes, assessments, or other charges against said property, or to collect or disburse any rentals therefrom or protect or perfect any title it may have thereto, or in any other respect to care for, maintain and protect the trust estate or this Trust against

any legal and/or equitable attack, unless and until requested so to do in writing by said Trustor, and/or said Beneficiary, accompanied by a sum of money, and/or at the option of the Trustee, indemnity of such character and amount, as shall in the judgment of said Trustee, be adequate and sufficient to pay or protect it against all costs, charges, expenses and liabilities expended or incurred in connection therewith, unless and until so requested in writing and so furnished with such money or indemnity, all responsibilities towards said property and this trust shall rest solely and exclusively upon said Trustor, and/or Beneficiary, and not upon said Trustee.

7. Said Trustee shall not be answerable or responsible for the validity of the conveyance to it of any property, or for the value thereof, or title thereto, nor for any easements, encumbrances, restrictions or other limitations thereon or claims thereto, but the sole, only and exclusive liability of said Trustee shall be to convey the aforesaid property upon the written request of the said Trustor, and/or said Beneficiary, and then only to convey such title thereto as shall actually have been conveyed to it and by it accepted in trust herein, and/or which the said Trustor, and/or said Beneficiary, may be able to maintain or perfect in said Trustee for the purposes of this Trust and not otherwise. No sale or transfer of any interest herein shall be valid or binding upon said Trustee unless and until the duplicate copy of the assignment thereof shall

have been first delivered to and accepted by the said Trustee for the purposes of transfer except where such interest may pass or be transferred by decree and/or order of court, and then only upon satisfactory proof of the regularity and validity of the [94] proceedings in such matter being presented to said Trustee, and no contracts of purchase or sale shall be executed or assigned in any way which will involve the Trustee in the recognition thereof.

If the whole or any of the property herein described or the proceeds or avails thereof, shall, at any time, during the term hereof, or upon the expiration of this Trust, become liable for payment of any estate, inheritance, income, or other tax, charge or assessments, which said Trustee shall be required to pay, then unless such taxes shall have been fully paid when due, by some one else, said Trustee is hereby authorized, at its option, without previous notice to or demand upon any person, to pay such taxes out of the whole or any portion of the property then subject to this trust, and for that purpose is hereby generally and specifically authorized and empowered, without previous notice, or demand, to or from any person whomsoever, to sell at public or private sale, and convey sufficient portion of the Trust Estate, up to and including the whole thereof, as shall fully pay all such taxes, all costs and expenses of such sale, all the sums together with interest thereon at seven percent per annum, payable quarterly, when due the Trustee,

under this Trust, or which it may have advanced or expended in the care, management and protection of the Trust Estate, and in the payment of any said estate, inheritance, income, or other taxes levied upon the Trust Estate, or on behalf of any one interested therein, and which said Trustee may be required to pay, shall constitute a first lien on all the property subject to this Trust, and in favor of said Trustee.

8. Upon the payment in full of any contract, the Trustee shall execute deed required, and furnish a Guarantee of Title to the Grantee, showing the property covered thereby vested in the seller, free and clear of all encumbrances and assessments assessed prior to date of said contract; subject, however, to all conditions, restrictions and reservations as provided aforesaid.

9. To permit and authorize the Beneficiary upon the giving of a ..... Bond therefor satisfactory to the Trustee and subject to the conditions and restrictions herein provided for, to enter [95] upon and improve, according to the map filed hereunder, as said Beneficiary may see fit in respect thereto, the trust property, or any part thereof, or the adjoining streets or highways, and the sidewalks created by said subdivision thereof; it being expressly stipulated and agreed that the said Beneficiary shall at all times hereunder pay all taxes as and when they become due, and keep the property free from all liens or assessments by reason of such improvements. The Trustee shall within ten days

after the inception of the work of improvement on the demised premises, under said subdivision or otherwise, when the same has come to its notice, post notice of non-responsibility upon said property and record the same, as required under Section 1192 of the Code of Civil Procedure, provided that the Beneficiary shall at all times keep the Trustee advised of any and all improvements upon said premises.

ARTICLE THREE.

Conditions.

1. The Trustee shall not be required to advance any money or to incur any personal liability in or about the protection of the trust property, or in respect to any of the contracts to be made by it hereunder (except for the liability to account for money coming into its hands) as herein contemplated, and any advancements herein provided to be made by the Trustee and any personal obligations which it may hereunder incur for advancements out of its personal or private funds shall be at all times taken as being optional and in no respect obligatory.

2. The Trustee hereunder shall be entitled in the event of any action being brought by the Trustee herein, for the enforcement of contracts executed provisional to this trust, select and nominate any reputable attorney to represent the Trustee, provided that whenever any action is brought pursuant to this Trust in the name of the Trustee, the Trustee

before bringing such action or authorizing its name to be used therein, shall be entitled to require of the parties hereto, reasonable and satisfactory security to protect it against costs or liabilities incurred in and about such action. [96]

3. The Trustee shall not be liable to the parties hereto, or otherwise, for the misconduct, malfeasance or misappropriation of any attorney, agent or representative selected by it upon the nomination or request of the said parties of this trust, except where such agent or attorney may act upon the express authorization of the Trustee, outside of the terms of the contract authorized hereby.

The Beneficiary agrees to install water mains, gas mains, telephone and electric poles to any and all parts of the demised premises, it being understood and agreed that the work of installation thereof will be begun within a reasonable time after execution of this Declaration of Trust. All street work, such as grading, oiling, curbing and sidewalks, to be begun within sixty (60) days from actual possession of said premises and be prosecuted with due diligence until completed—all work to comply with requirements of the City of Beverly Hills. It is understood and agreed that the Beneficiary hereunder is primarily responsible for all improvements on said property, and expenses of this trust, including the payment of commissions to the said M. M. Gilchrist and the agents for sales on property, and that the same shall be deductible from

the forty (40) per cent payable to the order of the Beneficiary hereunder for the purpose of carrying out the provisions of this Trust, provided that the said Trustor shall at no time be held liable for any expenses relative to the matters herein contained, except and until it shall have gained control of the Trust under the foreclosure of the interest of the Beneficiary hereunder, as hereinafter set out.

It is further understood and agreed that the balances of purchase price due from the Beneficiary to the Trustor hereunder shall bear interest at the rate of seven (7) per cent per annum, payable semi-annually, from and after the 1st day of July, 1923, until fully paid and chargeable against the forty (40) per cent set aside for operating expenses hereunder, provided, further, that in the event that upon any interest payment date insufficient funds are available in said [97] reservation account for the purpose of paying either the installment of principal then due, and/or the interest due on the balance, then and in that event the Beneficiary shall pay the same into the Trust for that purpose. After the indebtedness due to the Trustor from the Beneficiary, together with the interest thereon, as hereinabove provided, and any advancements made in accordance with the provisions hereof, and the costs and expenses of this trust, as herein provided, have been paid, then the Trustee shall hold all of the money then or thereafter coming into its hands, and the property then remaining in its hands for

the sole benefit of and subject to the order of the Beneficiary, and any property remaining in its hands shall then be sold at such price and upon such terms as it may direct. In the event that the Beneficiary herein shall sell, assign and transfer its interest in this Trust, or any part thereof, then, in the management of said property and the sale of said lots, the Trustee, as regards the interest of the Beneficiary and those who have succeeded to any or all of its interests hereunder, is hereby authorized and empowered to act upon the order of those, collectively, holding a majority of the beneficial interest hereunder by virtue of such assignments, in respect to the rights of the Beneficiary hereunder, and any such assignments of any beneficial interests hereunder shall be made subject to the provision that respective assignees, as a condition precedent to the validity of said assignment, respectively assume and agree to perform all the things agreed to be done and performed by the Beneficiary hereunder, in accordance with their proportionate share of such beneficial interest as they may have received, by virtue of the respective assignments. And the Beneficiary hereof does hereby bind itself to pay, as and when due, all sums of money necessary for the subdivision and improvement of said property, for taxes and for all and any other obligations provided for herein to be paid by the Beneficiary, and also any advancements made either for the benefit of the Beneficiary, or for the benefit of the property, including the fees, expenses and charges of

the Trustee for acting hereunder, immediately and upon demand made by the Trustee, together with interest, if any, accrued [98] thereon, unless the equivalent thereof available to the Trustee for said purpose shall be standing to the credit of the Beneficiary with the Trustee, realized from the sale of said property, or otherwise, and in the event of the default of the payment of the obligations, or any of them provided hereunder to be paid by the Beneficiary, the Trustee shall upon the written request of the Trustor, or at its option to cover its fees and expenses and advancements hereunder, sell the interest of the said Beneficiary under this Trust, which sale shall be made in the following manner, namely:

The Trustee shall, upon the serving upon it of the written declaration of default by the Trustor, or upon its own initiative, to cover expenses and costs hereunder, or other obligations past due and payable by the Beneficiary hereunder, publish notice of the time and place of such sale, with a general description of the interests so to be sold, at least once a week for four successive weeks, in some newspaper of general circulation published in the City of Los Angeles, California, and may from time to time postpone such sale by publication of such postponement in the same newspaper in one issue only prior to the date of sale, or at its option by public announcement of such postponement at the time and place of such sale so advertised, as aforesaid, and on the date of such sale so advertised, or

on the date to which such sale may be postponed, the Trustee shall sell the interest so advertised at public auction, in the City of Los Angeles, to the highest bidder for cash, provided that not more than ten days prior to the date of said sale published as the date of sale of said property, and not less than five days previous to said date so fixed. said Trustee shall post in not less than three public places in Los Angeles County a similar notice to that published, thus setting out the date of sale, and any beneficiary hereunder, or other person, may bid and purchase at such sale, and upon such sale the Trustee, after due payment made to it hereunder of the sale price therefor, may make and deliver to the purchaser at such sale an assignment and transfer of the interest so sold, and thereafter such purchaser shall have the same right and privileges hereunder of the original [99] Beneficiary, or its assigns, so defaulting, as aforesaid, subject however to all the terms and conditions of this trust, and the said Beneficiary for itself and its successors and assigns, does hereby convey, assign and transfer to the Trustee any and all right, title and interest whatsoever in and to its beneficial interest hereunder, to enable the Trustee to convey, assign and transfer such interest upon such sale thereof by the Trustee, in the event of default, as above provided, and any subsequent assignment of beneficial interest made by the Beneficiary shall be subject to the assignment by it for the purpose of accomplishing the object of this provision in this

Declaration of Trust, as hereinabove set out, and shall be so accepted by such subsequent assigns.

Distribution from the proceeds arising from such sale by the Trustee shall be made and applied by the Trustee as follows:

1st. To the payment of expenses of such sale, including the Trustee's fee of $1000.00, which amount shall be in addition to the fees elsewhere provided, all to become and be due and payable upon action by the Trustee on its own behalf in such sale, or upon demand being made upon the Trustee for the sale by it of the interest of such defaulting Beneficiary or its assigns, as hereinabove provided.

2nd. To the Trustor, person or persons, to whom the same may be due, being the obligation upon which the default has been declared and forming the basis of such sale, and the remainder to any other obligation payable by the Beneficiary, or its assigns hereunder, and secured hereby, and the balance if any to the defaulting party. In the event of the sale, as aforesaid, of any such interest of any such defaulting Beneficiary, or its assigns, in this trust, and the execution by the Trustee of the assignment and transfer thereof under this trust, then the recitals therein as to the default and publication of notice of sale, and the demand that such sale be made, postponement of sale, amount and terms of sale, purchaser, payment of purchase money, or any other fact or facts affecting the regularity and validity of such sale, shall be conclusive proof of all facts recited in such assignment, and

any such assignment and transfer with such [100] recitals therein shall be effectual and conclusive against such defaulting Beneficiary and/or its assigns, and all other persons as to all facts recited therein; and the receipt for the purchase money contained in any assignment and transfer executed by the Trustee to the purchaser at any such sale as aforesaid shall be sufficient discharge to such purchaser from all obligations to see to the proper application of the purchase money. It is understood, however, that there shall be no personal liability on the part of any such beneficiary or its assigns for any deficiency which might result from the insufficiency of the sale price, except that nothing herein shall in any way relieve any of the parties hereto from liability to the Trustee for its fees, costs and expenses and release from liability hereunder. Provided, however, that the Trustee hereby agrees to act under the terms of this instrument upon the following conditions:

That, except upon its willful default or gross negligence, it shall not be liable to anyone, and when in its discretion it acts upon the advice of legal counsel selected and employed by it in good faith in accordance with the opinion of such counsel, it shall not be liable for any result of such action, and the Trustee does not and shall not assume any obligation to pay for, or on account of any of the parties hereto or said Trust property or to or for the account of any one whomsoever any money except as herein specifically provided, except at its option to do so.

Termination of Trust.

The Trustee hereunder may upon sixty (60) days written notice to the Trustor and/or its successors or assigns, and to the Beneficiary and/or its successors or assigns, mailed to the last known address held by the Trustee, resign its Trusteeship, and such notice properly mailed, postage paid, at Los Angeles, California, shall become effective for all purposes from the date of said mailing, as the date of notice, and in the event of the failure or refusal of the Trustor and the Beneficiary, as aforesaid, to designate a successor hereunder within said period, the Trustee may apply to the Superior Court of Los Angeles County [101] which is hereby given jurisdiction and authorized to designate, appoint and employ a Trustee or Receiver as its successor hereunder. All moneys under this Trust shall be payable by check of the Trustee, and all deeds, contracts and similar instruments pertaining to the property held hereunder shall be executed by said Trustee, but said Trustee shall not be required, as aforesaid, to make any such conveyance unless and until there shall have been obtained by it, and furnished at the expense of this Trust prior to the execution thereof, a Guarantee or Certificate of Title furnished by a reliable Title Company, showing the property desired to be conveyed vested free and clear of all encumbrances in said Trustee, except the restrictions, reservations and conditions, as hereinbefore especially provided for.

Compensation of Trustee.

The Trustee shall be entitled to, and receive, the following compensation for its services in or about the performance of this trust:

1. Acceptance fee $250.00;
2. One (1) per cent on all cash sales, and on sales under Contracts of sale where the deferred payments are not more than four in number and not extended over a period of more than twenty-four (24) months from the date of execution thereof. Three (3) per cent on all sales under contract where a greater number of deferred payments are provided for over a period of time not more than twenty-four (24) months, or the period provided for making said payments, or in which the same is not paid, is more than twenty-four (24) months;
3. $1.50 for each contract of sale executed by the Trustee, and $2.50 for each deed or other instrument executed by the Trustee; or acceptance of an assignment;
4. Closing fee of $250.00.

Reasonable compensation for any and all extraordinary services for which the costs, fees and expenses are not hereunder especially provided for.

The aforesaid fees shall be collected by the Trustee [102] from the corpus of this Trust and/or any moneys in its possession, and/or any parties hereto, unless prior to the incurring thereof the same shall have been paid and the same shall be due as and when the said services are performed by the Trustee

herein, and this Trust shall not cease or terminate in any event until all the costs, fees, expenses, liabilities, advances if any with interest thereon, of the Trustee as incurred herein, or by reason hereof, shall have been fully paid.

It is understood and agreed that the Trustor shall have to and including August 9, 1923 within which to remove from the premises any and all buildings, improvements, equipment and personal property including fences; they being specifically reserved to the said Trustor hereunder.

The conditions and provisions of this Trust shall inure to and bind the said Trustee and the Trustor and the Beneficiary, their successors and assigns.

IN WITNESS WHEREOF, the BANK OF AMERICA in its capacity as Trustee, has caused this instrument to be duly executed by its officers thereunto duly authorized, and its corporate seal to be affixed the day and year first above written.

BANK OF AMERICA,
By ORA E. MONNETTE
President.
By VICTOR P. SHOWERS
Asst. Secretary.

Approved:
JAY E. RANDALL
Trust Officer. [103]

The undersigned, named in the above Declaration of Trust, as Trustor and Beneficiary, do hereby respectively approve, ratify and confirm the same

in all its particulars, and do hereby declare that the same sets forth the full terms and conditions under which the same properties are held in trust, and do hereby respectively agree to be bound by all of the terms hereof, and to do and perform all the respective obligations contained therein, to be paid, done or performed by us respectively.

RODEO LAND & WATER COMPANY,
By [Signature Illegible]
President.
By F. B. SUTTON
Secretary.
BERKELEY HALL SCHOOL,
By LEILA L. COOPER
President.
By MABEL R. COOPER
Secretary. [104]

PRICE LIST.

Lot	Price	Lot	Price	Lot	Price
1	$4000.00	45	$1300.00	106	$1350.00
2	2000.00	46	2400.00	107	1350.00
3	1750.00	47	3000.00	108	1350.00
4	2500.00	48	1000.00	109	1350.00
5	16300.00	49	1000.00	110	2550.00
10	2300.00	50	1000.00	128	2500.00
11	1750.00	51	1000.00	129	1750.00
12	1750.00	52	1000.00	130	1750.00
13	1750.00	53	1000.00	131	1750.00
14	1750.00	54	1000.00	132	2500.00
15	1750.00	55	1000.00	133	1100.00
16	1750.00	56	1500.00	134	1200.00
17	1750.00	62	2500.00	135	1200.00
18	1750.00	63	1750.00	136	1200.00
19	4000.00	64	1750.00	137	3000.00
20	2800.00	65	1850.00	138	2000.00
21	2000.00	66	2500.00	139	1200.00
22	2000.00	67	44200.00	140	1200.00
23	2000.00	84	2500.00	141	1200.00
24	2000.00	85	1300.00	142	1200.00
25	2100.00	86	1300.00	143	1200.00
26	2200.00	87	1300.00	144	1200.00
27	2250.00	88	1300.00	145	1200.00
28	2250.00	89	1300.00	146	1200.00
29	2250.00	90	1300.00	147	2600.00
30	3000.00	91	1300.00	148	2600.00
31)		92	1300.00	149	1400.00
32)	12500.00	93	1300.00	150	1400.00
33	4650.00	94	1200.00	151	1400.00
34)		95)		152	1400.00
35)	11500.00	96)	11000.00	153	1400.00
36	1200.00	97	4700.00	154	1400.00
37	1300.00	98)		155	1400.00
38	1300.00	99)	11000.00	156	1400.00
39	1300.00	100	1250.00	157	1400.00
40	1300.00	101	1400.00	158	1350.00
41	1300.00	102	1350.00	159)	
42	1300.00	103	1350.00	160)	11000.00
43	1300.00	104	1350.00		
44	1300.00	105	1350.00		

[105]

PRICE LIST.

Lot	Price	Lot	Price	Lot	Price
161	$4700.00	201	$1300.00	241	$1400.00
162)		202	1300.00	242	1400.00
163)	11000.00	203	1300.00	243	1400.00
164	1350.00	204	1300.00	244	1400.00
165	1400.00	205	1300.00	245	1400.00
166	1400.00	206	1300.00	246	2200.00
167	1400.00	207	1300.00	247	3000.00
168	1400.00	208	1300.00	248	1250.00
169	1550.00	209	2300.00	249	1250.00
170	1550.00	210	2700.00	250	1250.00
171	1400.00	211	1400.00	251	1250.00
172	1400.00	212	1400.00	252	2500.00
173	1400.00	213	1400.00	253	1750.00
174	2650.00	214	1400.00	254	1750.00
175	2700.00	215	1400.00	255	1750.00
176	1300.00	216	1400.00	256	2500.00
177	1300.00	217	1400.00	257	1250.00
178	1300.00	218	1400.00	258	1350.00
179	1300.00	219	1400.00	259	1350.00
180	1300.00	220	1350.00	260	1350.00
181	1300.00	221)		261	3000.00
182	1300.00	222)	11000.00	262	2200.00
183	1400.00	223	4750.00	263	1450.00
184	2000.00	224)		264	1450.00
185	2950.00	225)	11500.00	265	1450.00
186	1250.00	226	1400.00	266	1450.00
187	1250.00	227	1500.00	267	1450.00
188	1250.00	228	1500.00	268	1450.00
189	1250.00	229	1500.00	269	1450.00
190	2500.00	230	1500.00	270	1450.00
191	1750.00	231	1500.00	271	2300.00
192	1750.00	232	1500.00	272	2750.00
193	1750.00	233	1500.00	273	1550.00
194	2500.00	234	1500.00	274	1550.00
195	1050.00	235	1600.00	275	1550.00
196	1250.00	236	2750.00	276	1550.00
197	1150.00	237	2300.00	277	1550.00
198	1250.00	238	1400.00	278	1550.00
199	2950.00	239	1400.00		
200	2000.00	240	1400.00		

PRICE LIST.

Lot	Price	Lot	Price		
279	$1550.00	312	$1400.00	345)	
280	1550.00	313	1300.00	346)	$12500.00
281	1550.00	314	2000.00	347	4750.00
282	1400.00	315	1750.00	348)	
283)		316	1750.00	349)	15000.00
284)	11500.00	317	3500.00	350	3800.00
285	4750.00	318	2600.00	351	2500.00
286)		319	1500.00	352	2700.00
287)	11500.00	320	1400.00	353	2650.00
288	1550.00	321	1550.00	354	2600.00
289	1650.00	322	1400.00	355	2600.00
290	1650.00	323	3450.00	356	2600.00
291	1650.00	324	2300.00	357	2600.00
292	1650.00	325	1500.00	358	2600.00
293	1650.00	326	1650.00	359	2800.00
294	1650.00	327	1650.00	360	4000.00
295	1650.00	328	1650.00	361	3300.00
296	1650.00	329	1650.00	362	2750.00
297	1650.00	330	1650.00	363	2600.00
298	2750.00	331	1650.00	364	2600.00
299	2500.00	332	1650.00	365	2600.00
300	1650.00	333	2500.00	366	2600.00
301	1650.00	334	2750.00	367	2600.00
302	1650.00	335	1650.00	368	2600.00
303	1650.00	336	1650.00	369	2750.00
304	1650.00	337	1650.00	370	3150.00
305	1650.00	338	1650.00	371	4000.00
306	1650.00	339	1650.00	372	2300.00
307	1650.00	340	1650.00	373	2300.00
308	2300.00	341	1650.00	374	2600.00
309	3450.00	342	1650.00	375	2600.00
310	1400.00	343	1650.00		
311	1400.00	344	1650.00		

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PURCHASE CONTRACT
TRACT 6819

SCHEDULE B

AGREEMENT FOR SALE OF
REAL ESTATE

THIS AGREEMENT, entered into in triplicate this ..... day of ....., 1923, by and between BANK OF AMERICA, a corporation, party of the first part, and hereinafter designated as the Seller, and.....

.....

.....

the part..... of the second part, and hereinafter designated as the Buyer;

WITNESSETH: That for and in consideration of the terms, covenants and considerations hereinafter contained, the said Seller agrees to sell to the Buyer, and the said Buyer agrees to buy from the Seller, all that certain real property situate in the city of Beverly Hills, County of Los Angeles, State of California, particularly described as follows, to-wit: Lot ....., Tract Number 6819, as per map of said tract recorded in Book ....., Page ..... of Maps, recorded in the office of the County Recorder of said county.

That the purchase price thereof is the sum of .....Dollars ($.....) in Gold Coin of the United States, and which said sum said Buyer agrees to pay to the Seller as fol-

lows, to-wit: $..... cash upon execution of this Agreement to the Seller, in hand paid, receipt whereof is hereby acknowledged, and the balance thereof payable $..... on or before the 1st day of December, 1923; $..... on or before the 1st day of June, 1924; and $..... on or before the 1st day of December, 1924, together with 7% interest, payable semi-annually.

The Buyer agrees to pay all taxes and assessments which may hereafter become due against the said property at least ten days before the same become delinquent and, upon failure so to do, the Seller shall have the right to pay the same, together with any and all costs and legal percentages which may be added thereto; and the amount so paid, with interest thereon at the rate of seven per centum per annum from the date of payment until repaid, shall be secured hereby and shall be repaid by said Buyer to the Seller on demand.

IT IS FURTHER AGREED that time is of the essence of this contract, and if the Buyer shall fail or make default in any of the payments herein promised and agreed to be paid, as the same mature or become due, or of any installment of interest, and shall continue in default for a period of sixty days beyond the due date, as herein provided, or shall fail to pay said taxes or assessments as in this contract provided, or shall fail in any respect to carry out the terms of this contract, then this agreement may be terminated and cancelled at the option of the Seller, without further notice from the Seller,

and the Seller shall thereupon be released from all obligation, in law or in equity, to convey said property, and the said Buyer hereby agrees that he or she will and shall forfeit all right thereto, and all moneys paid to Seller shall be forfeited to and retained by the Seller as rent and agreed as liquidated damages for said default, the Buyer hereby expressly waiving written notice of said default.

All payments due or to become due under this contract of purchase must be made at the Bank of America, 752 South Broadway, Los Angeles.

It is agreed that the Seller is not responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not set forth herein.

As soon as the Buyer shall have made all payments hereunder, including principal, taxes, assessments and interest, as aforesaid, if made within the time and manner aforesaid as a condition precedent, said Seller shall, and it does hereby agree to convey said premises by a deed of grant to the said Buyer, and to furnish a certificate of title, showing its title to said lands to be free of encumbrances made or suffered by the Seller at the date of said conveyance, subject to municipal ordinances, if any, affecting the use and occupancy of the premises, and restrictions, reservations and limitations of record, and the provisions as follows, to-wit:

RESTRICTIONS, RESERVATIONS AND CONDITIONS

This contract of purchase is made upon the condition that said property shall not be used, nor shall any part thereof be used, for the purpose of drilling thereon for, or producing therefrom, oil, gas or any other mineral substance.

The purchaser of any lot or lots shall not, nor shall any of their assigns or successors in interest, nor those holding or claiming to hold thereunder, use or cause to be used, or allow or authorize in any manner, directly or indirectly, the premises, or any part thereof, to be used for the purpose of vending intoxicating liquors for drinking or any other purposes.

The premises shall not be rented, leased or conveyed to, held by, or occupied by any person other than of the white or Caucasian race.

All lots fronting on Wilshire Boulevard and to a depth of 150 feet therefrom may be used for either residence or business purposes, and shall cost not less than $5,000.00, and any outbuildings, private stables or private garages shall not be erected within 75 feet of Wilshire Boulevard.

All buildings to be erected on Doheny Drive, except Lot 350, shall be used exclusively as private residence, with a limit of one house to each lot, except Lots 360, 317 and 371, which may be occupied with one or more houses, and no residence to be erected on said lots shall cost less than $5,000.00.

The foundations of all said buildings shall show a set-back from the front property line of 20 feet, and all driveways leading to the rear of said premises, excepting Lot 350, shall be placed on the south side of said lots. On Lots 360, 361, 370 and 371, all buildings erected thereon must have a set-back from the side property line of at least five feet. Any outbuildings, private stable or garage erected in conjunction therewith shall be located not less than 75 feet from Doheny Drive. Lot 350 is governed by same conditions as apply to property fronting on Wilshire Boulevard.

All buildings to be erected on Wetherly Drive shall be used exclusively as private residences, with a limit of one residence to each lot, and must represent a cost of not less than $4,000.00. The foundations of all said buildings must show a set-back from the front property line of 20 feet, and all driveways leading to the rear of said dwellings, except Lots 288, 289, 299, 308, 309, 313, 344, 334, 333, 324, 323 and 319, inclusive, shall be placed on the south side of said lots. On Lots 288, 298, 299, 308, 309, 334, 344, 333, 324, 323, 319 and 313, all buildings erected thereon must have a set-back from the side property line of at least five feet, except Lots 313, 319, 288 and 347.

All buildings to be erected on Almont Drive and La Pere Drive shall have a set-back of 15 feet from the foundation to the front property line, and all driveways leading to the rear of said premises must be placed on the south side of the property, except Lots 164, 174, 175, 184, 185, 189, 195, 199, 200, 209,

210, 220, 226, 236, 237, 246, 247, 251, 257, 261, 262, 271, 272 and 282. On lots 164, 174, 175, 184, 185, 189, 195, 199, 200, 209, 210, 220, 226, 236, 237, 246, 247, 251, 257, 261, 262, 271, 272 and 282, inclusive, all buildings erected thereon must have a set-back of not less than 5 feet from the side line of said property, except Lots 164, 189, 195, 220, 226, 251, 257, and 282.

No buildings, however, can be erected on said lots at cost less than $3,500.00, and this restriction applies where one or more buildings are erected on any one lot and intended for occupancy.

On lots facing on Almont and La Pere Drives, there are no restrictions against the building of double bungalows, duplexes, apartments, flats or bungalow courts, but restriction does apply against the erection of any building for use or occupancy as a mercantile business.

All buildings erected on Swall Drive shall have a set-back of 15 feet from the foundation to the front property line, and all driveways leading to the rear of said premises must be placed on the south line of the property, except Lots 67, 100, 110, 133, 137, 138, 147, 148, 158, inclusive. On Lots 67, 100, 110, 133, 137, 138, 147, 148, 158, inclusive, all buildings erected thereon must have a set-back of not less than 5 feet from the side line of said property, except Lots 100, 133 and 158. No building, however, can be erected on said property at a cost less than $3,500.00, and this restriction applies where one or more buildings are erected on one lot and intended

for occupancy. There are no restrictions against the building of double bungalows, duplexes, apartments, flats or bungalow courts on property abutting Swall Drive, but restriction does apply against the erection of any building for use or occupancy as a mercantile business. Lot 67, facing Swall Drive, is restricted only to its general use for buildings and grounds for educational or religious purposes, private residences, double bungalows, duplexes, flats, apartments or bungalow courts. [108]

All buildings erected on Clark Drive shall have a set-back of 15 feet from the foundation to the front property line, and all driveways leading to the rear of said premises must be placed on the south line of the property, except Lots 84, 46, 47, 56, 36 and 94, inclusive. On Lots 84, 46, 47, 56, 36 and 94, inclusive, all buildings erected thereon must have a set-back of five feet from the side line of said property, except Lots 36 and 94. No building, however, can be erected on said property at a cost less than $3,500.00, and this restriction applies where one or more buildings are erected on one lot and intended for occupancy. There are no restrictions against the building of double bungalows, duplexes, apartments, flats or bungalow courts on property abutting Clark Drive, but restriction does apply against the erection of any building for use or occupancy as a mercantile business. Lots 67 and 5, facing Clark Drive, are restricted only to their general use for buildings and grounds for educational or religious purposes, private residences, double bunga-

lows, duplexes, flats, apartments or bungalow courts.

All lots having a frontage on Pruess Road, except Lot 5, and to a depth of 100 feet, may be used for either residence or business purposes, but any building erected thereon (except outbuildings, private stables or private garages) shall cost and be fairly worth $3,500.00. Lot 5 may be used as playgrounds as well as for residence or business purposes.

All lots having a frontage on Burton Way may be used for either residence or business purposes, but any building erected thereon (except outbuildings, private stable or private garages) shall cost and be fairly worth $3,500.00.

No building shall be permitted having a frontage on either Dayton Way or Clifton Way.

The breach of any of the conditions and covenants contained herein shall cause said premises, together with the appurtenances thereto belonging, to be forfeited and revert to the grantors, their heirs, successors or assigns, each of whom shall have the right to immediate entry upon said premises in the event of such breach; provided, however, that before any forfeiture may be declared or enforced, the grantors, their heirs, successors or assigns, shall post in a conspicuous place on the premises a written notice, declaring his intention so to do, and if within thirty days thereafter the grantee shall cure the breach then no forfeiture shall be declared or enforced therefor. But the breach of

any of the said conditions or covenants, or any re-entry by reason of such breach, shall not defeat or affect the lien of any mortgage or deed of trust made in good faith, for value, upon said land; provided, however, that the breach of any of said conditions may be enjoined, abated or remedied by appropriate proceedings, notwithstanding the lien or existence of the trust deed or mortgage; but nevertheless, each and all of the said conditions and covenants shall remain at all times in full force and effect as against and shall be binding upon, and shall be part of the estate acquired by any one, and the successors and assigns of any one, acquiring title under or through any such deed of trust or mortgage, and a forfeiture and re-entry may be enforced following any breach by them or any of them.

Sidewalks and curbs and water and gas mains, also telephone and electric poles and wires, shall be installed, and streets graded, oiled and graveled, without expense to the Buyer.

That all and each of the restrictions, conditions and covenants herein contained shall in all respects terminate and end and be of no further effect, either legal or equitable, either on any property in said tract or on the parties hereto, their heirs, successors, devisees, executors, administrators or assigns, on and after January 1, A. D. 1950.

IN WITNESS WHEREOF, the said Seller, BANK OF AMERICA, a corporation, and the said

Buyer have hereunto set ..... hand..... and seal..... the day and year first above written.

BANK OF AMERICA

By.....

President.

By.....

Secretary.

Buyer's Signature:

.....

.....

Buyer's Address:

.....

.....

[109]

THIS INDENTURE, made the ..... day of ....in the year of our Lord one thousand nine hundred and twenty.....

BETWEEN BANK OF AMERICA, a corporation organized and doing business under the laws of the State of California, and having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, the party of the first part and....., the part..... of the second part,

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Ten ($10.00) Dollars, gold coin of the United States of America, to it in hand paid by the said part..... of the second part, the receipt whereof is hereby ac-

knowledged, has granted, bargained and sold, and by these presents does grant, bargain and sell, convey and confirm, unto the said part..... of the second part, and to..... heirs and assigns forever, all that certain lot....., piece..... or parcel..... of land situate, lying and being in the City of Beverly Hills, County of Los Angeles, State of California, bounded and particularly described as follows, to-wit:

RESTRICTIONS, RESERVATIONS AND CONDITIONS OF RECORD AND AS FOLLOWS:

This conveyance is made upon the condition that said property shall not be used, nor shall any part thereof be used, for the purpose of drilling thereon for, or producing therefrom, oil, gas or any other mineral substance.

The purchaser of any lot or lots shall not, nor shall any of their assigns or successors in interest, nor those holding or claiming to hold thereunder, use or cause to be used, or allow or authorize in any manner, directly or indirectly, the premises, or any part thereof, to be used for the purpose of vending intoxicating liquors for drinking or any other purposes.

The premises shall not be rented, leased or conveyed to, held by, or occupied by any person other than of the white or Caucasian race.

All lots fronting on Wilshire Boulevard and to a depth of 150 feet therefrom may be used for either residence or business purposes, and shall cost not less than $5,000.00, and any outbuildings, private

stables or private garages shall not be erected within 75 feet of Wilshire Boulevard.

All buildings to be erected on Doheny Drive, except Lot 350, shall be used exclusively as private residence, with a limit of one house to each lot, except Lots 360, 317 and 371, which may be occupied with one or more houses, and no residence to be erected on said lots shall cost less than $5,000.00. The foundations of all said buildings shall show a set-back from the front property line of 20 feet, and all driveways leading to the rear of said premises, excepting Lot 350, shall be placed on the south side of said lots. On Lots 360, 361, 370 and 371, all buildings erected thereon must have a set-back from the side property line of at least five feet. Any outbuildings, private stable or garage erected in conjunction therewith shall be located not less than 75 feet from Doheny Drive. Lot 350 is governed by the same conditions as apply to property fronting on Wilshire Boulevard.

All buildings to be erected on Wetherly Drive shall be used exclusively as private residences, with a limit of one residence to each lot, and must represent a cost of not less than $4,000.00. The foundations of all said buildings must show a set-back from the front property line of 20 feet, and all driveways leading to the rear of said dwellings, except Lots 288, 289, 299, 308, 309, 313, 344, 334, 333, 324, 323 and 319, inclusive shall be placed on the south side of said lots. On Lots 288, 298, 299, 308, 309, 334, 344, 333, 324, 323, 319 and 313, all buildings erected

thereon must have a set-back from the side property line of at least five feet, except Lots 313, 319, 288 and 347.

All buildings to be erected on Almont Drive and La Pere Drive shall have a set-back of 15 feet from the foundation to the front property line, and all driveways leading to the rear of said premises must be placed on the south side of the property, except Lots 164, 174, 175, 184, 185, 189, 195, 199, 200, 209, 210, 220, 226, 236, 237, 246, 247, 251, 257, 261, 262, 271, 272 and 282. On lots 164, 174, 175, 184, 185, 189, 195, 199, 200, 209, 210, 220, 226, 236, 237, 246, 247, 251, 257, 261, 262, 271, 272 and 282, inclusive, all buildings erected thereon must have a set-back of not less than 5 feet from the side line of said property, except Lots 164, 189, 195, 220, 226, 251, 257 and 282.

No buildings, however, can be erected on said lots at cost less than $3,500.00, and this restriction applies where one or more buildings are erected on any one lot and intended for occupancy.

On lots facing on Almont and La Pere Drives, there are no restrictions against the building of double bungalows, duplexes, apartments, flats or bungalow courts, but restriction does apply against the erection of any building for use or occupancy as a mercantile business.

All buildings erected on Swall Drive shall have a set-back of 15 feet from the foundation to the front property line, and all driveways leading to the rear of said premises must be placed on the

south line of the property, except Lots 67, 100, 110, 133, 137, 138, 147, 148, 158, inclusive. On Lots 67, 100, 110, 133, 137, 138, 147, 148, 158, inclusive, all buildings erected thereon must have a set-back of not less than 5 feet from the side line of said property, except Lots 100, 133 and 158. No building, however, can be erected on said property at a cost less than $3,500.00, and this restriction applies where one or more buildings are erected on one lot and intended for occupancy. There are no restrictions against the building of double bungalows, duplexes, apartments, flats or bungalow courts on property abutting Swall Drive, but restriction does apply against the erection of any building for use or occupancy as a mercantile business. Lot 67, facing Swall Drive, is restricted only to its general use for buildings and grounds for educational or religious purposes, private residences, double bungalows, duplexes, flats, apartments or bungalow courts.

All buildings erected on Clark Drive shall have a set-back of 15 feet from the foundation to the front property line, and all driveways leading to the rear of said premises must be placed on the south line of the property, except Lots 84, 46, 47, 56, 36 and 94, inclusive. On Lots 84, 46, 47, 56, 36 and 94, inclusive, all buildings erected thereon must have a set-back of five feet from the side line of said property, except Lots 36 and 94. No building, however, can be erected on said property at a cost less than $3,500.00, and this restriction applies where one or

more buildings are erected on one lot and intended for occupancy. There are no restrictions against the building of double bungalows, duplexes, apartments, flats or bungalow courts on property abutting Clark Drive, but restriction does apply against the erection of any building for use or occupancy as a mercantile business. Lots 67 and 5, facing Clark Drive, are restricted only to their general use for buildings and grounds for educational or religious purposes, private residences, double bungalows, duplexes, flats, apartments or bungalow courts.

All lots having a frontage on Pruess Road, except Lot 5, and to a depth of 100 feet, may be used for either residence or business purposes, but any building erected thereon (except outbuildings, private stables or private garages) shall cost and be fairly worth $3,500.00. Lot 5 may be used as playgrounds as well as for residence or business purposes.

All lots having a frontage on Burton Way may be used for either residence or business purposes, but any building erected thereon (except outbuildings, private stable or private garages) shall cost and be fairly worth $3,500.00.

No building shall be permitted having a frontage on either Dayton Way or Clifton Way.

The breach of any of the conditions and covenants herein contained shall cause said premises, together with the appurtenances thereto belonging, to be forfeited to and revert to the grantors, their

heirs, successors or assigns, each of whom shall have the right to immediate entry upon said premises in the event of such breach; provided, however, that before any forfeiture may be declared or enforced, the grantors, their heirs, successors or assigns, shall post in a conspicuous place on the premises a written notice, declaring his intention so to do, and if within thirty days thereafter the grantee shall cure the breach, then no forfeiture shall be declared or enforced therefor. But the breach of any of the said conditions or covenants, or any re-entry by reason of such breach, shall not defeat or affect the lien of any mortgage or deed of trust made in good faith, for value, upon said land; provided, however, that the breach of any of said conditions may be enjoined, abated or remedied by appropriate proceedings, notwithstanding the lien or existence of the trust deed or mortgage; but nevertheless, each and all of the said conditions and covenants shall remain at all times in full force and effect as against and shall be binding upon, and shall be part of the estate acquired by any one, and the successors and assigns of any one, acquiring title under or through any such deed of trust or mortgage, and a forfeiture and re-entry may be enforced following any breach by them or any of them.

Sidewalks and curbs and water and gas mains, also telephone and electric poles and wires, shall be installed, and streets graded, oiled and graveled, without expense to the Buyer.

That all and each of the restrictions, conditions

and covenants herein contained shall in all respects terminate and end and be of no further effect, either legal or equitable, either on any property in said tract or on the parties hereto, their heirs, successors, devisees, executors, administrators or assigns, on and after January 1, A. D. 1950. [110]

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD all and singular the said premises, together with the appurtenances, unto the said part..... of the second part, and to ..... heirs and assigns forever.

In Testimony Whereof, BANK OF AMERICA, a corporation, has caused this deed to be duly executed, the name of the corporation being signed by its .....President and attested by its..... Secretary, with the corporation seal, the day and year first above written.

BANK OF AMERICA

(SEAL) By.....

President.

Attest:

.....

Secretary.

State of California,
County of Los Angeles—ss.

On this ..... day of ....., in the year one thousand nine hundred and twenty.....,

before me, ..., a Notary Public in and for said County of Los Angeles, State of California, residing therein, duly commissioned and qualified, personally appeared..... known to me to be the.....President, and ....., known to me to be the ..... Secretary of Bank of America, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument, on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate above written.

.....

Notary Public in and for Los Angeles County, State of California. [111]

AMENDMENT TO TRUST 109

Bank of America
Los Angeles

RE.: TRUST 109

Gentlemen:

You are hereby advised that a certain Declaration of Trust, dated June 1, 1923, numbered 109, is hereby amended for and in respect to Paragraph 9, Page 6 of said trust as follows, to-wit:

THAT the said Trustee shall not be required to

post notice of non-responsibility on the property covered hereby, nor any part thereof, by reason of any subdivision, or other improvements in respect thereto, and that the bond to be required for the Trustee as satisfactory to it under said paragraph shall be a bond in the sum of $50,000 given by the contractor for the protection of the trust, and there shall be deposited in the trust by the Beneficiary a sum of not less than $45,000 to be paid out to the contractor by the Trustee upon the statement of the contractor supported by receipted bills O.K.'d by the Beneficiary.

Said Declaration of Trust is hereby modified and changed in accordance with the foregoing.

RODEO LAND & WATER COMPANY
By F. B. SUTTON
Vice-President
By J. P. AUCKENBACK
Asst. Secretary
BERKELEY HALL SCHOOL
By LEILA L. COOPER
President
By MABEL R. COOPER
Secretary

Los Angeles, California
September 28th, 1923

I hand you herewith check of Berkeley Hall School in the sum of $38,500.00 to be used by you in accordance with the foregoing requirements.

BERKELEY HALL SCHOOL
By M. M. GILCHRIST, Agent. [112]

RESPONDENT'S EXHIBIT A.

(Admitted in Evidence Sept. 27, 1933)

QUIT CLAIM DEED

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION, successor to BANK OF AMERICA in consideration of Ten and no/100 DOLLARS, to them in hand paid, the receipt of which is hereby acknowledged, does hereby release, remise and forever quitclaim to BERKELEY HALL SCHOOL, a corporation, all that real property in the City of Beverly Hills, County of Los Angeles, State of California, described as:

Lot Five (5), except those portions thereof conveyed by Bank of America to Fred O. Hammer and Edith W. Hammer, by deed dated June 9, 1925, to Omer J. Fortier and John B. Dennis by deed dated August 14, 1925, to Oscar M. Overell by deed dated January 29, 1924, and to Willard B. Follmer by deed dated June 4, 1925, also all of Lots Sixty-seven (67) and One Hundred Thirty-eight (138), Tract Seven Thousand Five (7005), as per map recorded in Book 72 Page 28 of Maps, in the office of the County Recorder of said County.

Witness the name of Bank of Italy National Trust and Savings Association, subscribed hereto by its Vice President, and Assistant Trust Officer, this 3rd day of August, 1927.

BANK OF ITALY NATIONAL TRUST AND SAVINGS ASSOCIATION.

By W. I. MELTENTHIN
Vice-President

By E. L. HUTCHINS
Assistant Trust Officer

State of California,
County of Los Angeles—ss.

On this 5th day of August, A. D., 1927 before me, Edward M. Browder, a Notary Public in and for the said County and State, residing therein, duly commissioned and sworn, personally appeared A. I. Mellenthin, known to me to be the Vice President and E. L. Hutchins, known to me to be the Assistant Trust Officer of the Bank of Italy National Trust and Savings Association, the Corporation that executed the within Instrument, known to me to be the persons who executed the within Instrument, on behalf of the Corporation therein named, and acknowledged to me that such Corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Seal) EDWARD M. BROWDER
Notary Public in and for said County and State.
[113]

EX. A.

Order No. 1010798

When recorded, please mail this deed to Beverly Hills Branch, Security Trust & Savings Bank, Canon Drive at Burton Way, Beverly Hills, Calif.

Compared. Read by Franklin.

Recorded at request of Title Insurance & Tr. Co. Aug. 23, 1927 at 8:30 A. M. in Book 7579, Page 322, of Official Records, Los Angeles County, Cal.

C. S. LOGAN
County Recorder

I certify that I have correctly transcribed this document in above mentioned book.

L. FARQUHAR

1.00

#111 [114]

RESPONDENT'S EXHIBIT ~~8~~ C.

(Admitted in Evidence Sept. 27, 1933)

47415

Notice of Election by Trustee to Have Income of Trust Taxed to Beneficiary

(To be filed with Collector where return was filed)

Date September 18, 1928.

Commissioner of Internal Revenue,

(Attention: Records Division, Income Tax Unit)

Washington, D. C.

Through the Collector of Internal Revenue at Los Angeles, Calif.

Sir:

In accordance with Section 704(b) of the Revenue Act of 1928, the undersigned trustee of the trust known as Rodeo Land & Water Co., Berkeley Hall School, # Bank of America 109 hereby certifies that such trust (1) had a single trustee, (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conserva-

tion, division, and sale of such property), distributing the proceeds therefrom in due course to or for the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association; and therefore elects to have the above-named trust considered as a trust for the years 1923 to 1927, both inclusive, and the income thereof taxed to the beneficiaries.

AFFIDAVIT

I swear (or affirm) that this notice of election, including the statements therein, has been examined by me, and, to the best of my knowledge and belief, the statements made therein are true, and the election is made in good faith pursuant to the Revenue Act of 1928 and the Regulations issued under authority thereof.

BANK OF ITALY
National Trust and Savings Association
By C. M. NUJES
Assistant Trust Officer
(Signature of Trustee or Officer representing Trustee)
7th and Olive Streets,
(Address of Trustee or Officer)
Los Angeles, Calif.

Sworn to and subscribed before me this 18th day of September, 1928.

(Seal) CLARA A. NASON
(Signature of Officer Administering Oath)
Notary Public in and for the County of Los Angeles, State of California.
(Title) [115]

[Title of Court and Cause.]

PRAECIPE FOR RECORD

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board.

2. Pleadings before the Board, (a) Petition, including annexed copy of deficiency letter, filed February 10, 1930. (b) Answer, filed March 29, 1930.

3. Findings of fact and opinion of the Board, promulgated January 24, 1935.

4. Decision of the Board, entered January 31, 1935.

5. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

6. Statement of evidence as settled and allowed.

7. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

8. This praecipe.

(Signed) ROBERT H. JACKSON
Assistant General Counsel for the Bureau of Internal Revenue.

CPR/mhk 11/21/35

Service of a copy of the within praecipe is hereby admitted this 30th day of December, 1935.

CLAUDE I. PARKER
RALPH W. SMITH
Attorney for Respondent.

[Endorsed]: Filed Jan. 9, 1936. [116]

[Title of Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 116, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 5th day of Feb., 1936.

(Seal) B. D. GAMBLE
Clerk, United States Board of Tax Appeals.

[Endorsed]: No. 8122. United States Circuit Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. Berkeley Hall School, Inc., Respondent. Transcript of the Record Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed February 10, 1936.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 8122.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

16

Commissioner of Internal Revenue,
Petitioner,

vs.

Berkeley Hall School, Inc.,
Respondent.

On Petition for Review of Decision of the United States Board of Tax Appeals.

BRIEF FOR THE RESPONDENT.

CLAUDE I. PARKER,

RALPH W. SMITH,

Bank of America Bldg., 650 S. Spring St., L. A.,

Attorneys for Respondent.

L. A. LUCE,

HENRY SCHAEFER, JR.,

Of Counsel.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX.

TABLE OF AUTHORITIES CITED.

No. 8122.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

Commissioner of Internal Revenue,
Petitioner,

vs.

Berkeley Hall School, Inc.,
Respondent.

BRIEF FOR THE RESPONDENT.

OPINION BELOW.

The only previous opinion in this case is the opinion of the Board of Tax Appeals [R. 14-32], which was reported in 31 B. T. A. 1116.

Jurisdiction.

This petition for review involves income tax for the fiscal year ending June 30, 1925, in the amount of $12,-021.99 [R. 15], and is taken from a decision of the Board of Tax Appeals entered January 31, 1935. [R. 32.] The case is brought to this Court on a petition for review filed April 13, 1935 [R. 33-40], pursuant to the provisions of sections 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109-110, as amended by section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

Question Presented.

Whether property received by respondent, who operated a Christian Science School, through the efforts of parents of children in the school, which property was definitely impressed with a charitable trust for the establishment and maintenance in perpetuity of a school for children under the influence of the Christian Science faith, is subject to income tax in the hands of respondent.

Statement of Facts.

We summarize the facts found in favor of the respondent by the Board of Tax Appeals.

In the year 1911 the Misses Leila and Mabel Cooper and Miss Mary E. Stevens, organizers of respondent and its sole stockholders, opened a Christian Science School in the city of Los Angeles. Respondent, however, was not incorporated until the year 1920 as a private, educational institution. By reason of prohibitions of the Christian Science Church it could not be chartered as a church school. Instruction in the school has at all times been limited to children of Christian Scientists, entrance requirements being that the parents are students of Christian Science and that pupils attend Christian Science Sunday School and be recommended by two practitioners. [R. 82.]

The school progressed but the organizers drew no salaries and the small profit realized was employed in the acquisition of additional facilities. In the year 1923 respondent's assets had a value of $25,000.00 against which it owed $13,000.00. [R. 67.]

For some time prior to the year 1923 parents of pupils in the school realized the lack of recreational facilities for the children and the necessity of securing more extensive

school quarters, or the abandonment of the school. The parents held many meetings, the first meeting being held in the year 1919 [R. 43], they were desirous of continuing the school that their children might continue under the influence of the Christian Science faith. Some of the mass meetings held were attended by as many as fifty or sixty parents of children in the school. An informal organization of the parents was effected known as the Berkeley Hall School Project. Mr. Swarzwald, a witness [R. 69] presided at the meetings. Committees were appointed to look into the feasibility of selecting and financing a site for a new school in the Beverly Hills District of Los Angeles. Respondent played little or no part in the projected plan. Respondent had nothing to do with the selection of the site for the school.

From time to time certain plans were discussed and found not feasible and nothing of a final nature was accomplished until April 13, 1923, at which time a group of the parents with financial worth of easily $2,000,000.00 [R. 51] jointly and severally agreed to guarantee the payment of $250,000.00 toward the purchase of fifty or more acres of land in the Beverly Hills District "as outlined at a meeting held this day at Berkeley Hall School". [R. 100.] The group of parents had conceived the plan of acquiring the acreage, subdividing same and so pricing the lots as to realize an overplus from the sale thereof after meeting the purchase price, to be used for the construction of new school buildings on the unsold acreage.

The parents selected Mr. Gilchrist, one of them, as their fiscal agent and representative to carry on the transaction to consummation. Mr. Gilchrist learned that a tract of land consisting of approximately 77.3 acres could be ad-

vantageously purchased in Beverly Hills. At a meeting of the parents it was unanimously agreed to acquire said acreage. An option was secured obligating a total purchase price of $462,180.00, payable $75,000.00 upon the execution of the conveyance and the balance at stated intervals. On April 30, 1923 [R. 101] some of the parents advanced $10,000.00 as an earnest money payment on the option, which sum would have been forfeited on failure to exercise the option within eight days by the payment of $75,000.00. On May 1, 1923 [R. 98] certain of the parents entered into a guarantee in favor of the Rodeo Land and Water Company, sellers of the tract of land, guaranteeing in a sum not to exceed $135,000.00 for the purchase of improvements on the tract and as payment on the acreage. Neither respondent nor any of its stockholders or officers were among the guarantors on either of the instruments referred to.

The acquired tract of land, with the exception of seven acres which were set aside for the new school buildings, was subdivided by Mr. Gilchrist into lots, prices fixed on each lot, and the project placed upon the market for sale. This was on the 30th day of April, 1923. The parents, in the order in which their names appeared on the guarantee, were given the right to purchase the lots at the release prices. Practically all the lots were sold within a period of eight days, many to parents of children of the school. Others were sold to friends and some few to the public. The parents realized a profit on the lots purchased by them. However, Mr. Swarzwald testified: "Some however, I still have and I would be very glad to sell it for half of what I paid for it". [R. 59.]

The parents had no legal organization. All formal steps in relation to the acquisition of the property were taken in the name of respondent, some without its knowledge. At the inception of the acquisition of the acreage the parents were required to secure the sum of $100,000.00. They called upon Mr. Orra Monette and Mr. J. E. Randall [R. 89], of the Bank of America, which institution was desirous of helping the religious and semi-charitable proposition. When being shown the guarantee of the parents the bank consented to make the loan. Before, however, it became necessary to provide the money through the bank loan there had been sold a sufficient number of the subdivided lots to meet this initial payment and the loan was thereby made unnecessary. In subdividing and passing titles to the property the parents selected the Bank of America to act as Trustee for the purpose of taking title to the land, executing the conveyances of the several lots, collecting the proceeds of sale, paying the development costs, and the installment payments to the Rodeo Land and Water Company. [R. 103.]

Under the setup in April, 1923, it was contemplated that the Bank would be required to advance approximately $135,000.00 to cover initial payments on the purchase price which would be repaid from the proceeds of lot sales. The rapidity of the marketing of the lots was beyond the expectation of all and before the title search was completed all but two or three of the lots had been sold.

The Declaration of Trust [R. 103], wherein the Bank is designated as Trustee, the Rodeo Land and Water Company as the seller of the property, and Berkeley Hall School as beneficiary, was brought about through a committee of parents or their representative, Mr. Gilchrist.

Respondent in this regard acted merely as directed by the parents or Mr. Gilchrist. Not any of the stockholders or officers of respondent possessed business experience. Leila Cooper, president of respondent, testified that she signed as director to make possible the execution of the plan conceived by the parents for the establishment of a school for children under the influence of the Christian Science faith.

In view of the religious and educational character of respondent, the Bank of American handled the matter of the escrow and Declaration of Trust for practically one-third of its regular fee.

In subdividing property a Declaration of Trust somewhat similar to that employed in the instant case was generally used. Here, however, the services to be rendered by the Bank Trustee were greatly limited, since at the time of the passing of title to the Trustee and the execution of the Declaration of Trust nearly all of the lots in the tract had been sold and cash had been received in excess of $100,000.00 to meet the initial payments to the Rodeo Land and Water Company, Trustor. To this extent the Trustee was not called upon to receipt or account for sales made.

It was at all times the intention of all those interested in the new school project that they should create a fund for the establishment and maintenance in perpetuity of a school to be operated under the influence of the Christian Science religion. Respondent had no cost in the project and did not enter into the transaction for profit. The

majority of the funds realized from the sale of the lots over and above the cost and development expenses were not paid to respondent but were paid out by the Bank, Trustee, direct to the contractors who erected the new school buildings. Any amounts paid to respondent were entered upon its books in a separate account from its own funds and were expended only under direction of a committee of the parents in furtherance of the building program.

The trust with the Bank of America was not terminated until 1927 at which time title to the undisposed acreage was transferred to respondent as beneficiary of the trust. Respondent, its officers or stockholders, did not at any time consider the new school project as their property or to do with as they saw fit but, on the contrary, all interested parties were of the impression that the property and all moneys received as result of the land transaction were impressed with a trust.

Respondent, upon receipt of the property and completion of the school buildings coming to it as beneficiary of the trust, made efforts to secure the perpetuation of the project and property as a foundation in accordance with the desire and intention of the parents' organization. Judge Douglas Edmonds, a prominent member of the Christian Science Church, made a trip to Boston, Massachusetts, to the headquarters of the Church, and asked for respondent and the parents' organization that the Church accept a transfer of the property from respondent and act as the permanent trustee in administration of the

fund. This request was refused by the Church for the reason that its activities were limited to those of religion and under its rules it could not assume as trustee the operation of the school. Steps were thereupon taken to effect the same result through a permanent trustee other than the Christian Science Church, wherein the Christian Science Church would become the beneficiary in the event of the dissolution of respondent; at the time of the trial, title to the school property stood in the name of the Title Guarantee and Trust Company, held by it in trust for the perpetuation of the school which trust is governed by a Board of Trustees, upon which Board stockholders of respondent have membership. [R. 87.]

The Board found the facts in favor of respondent, determining therefrom that a charitable trust had been created for the purpose of perpetuating a school for friends of Christian Science; that the parents had no intention in arranging for the acquisition of the property by the respondent, that the amounts voluntarily paid by them in excess of the cost of such lots should not inure in any way to the personal benefit of the respondent and its stockholders. It was the intention of the parents, as found by the Board, that the profits accruing from the land transaction should constitute a trust fund for the establishment and maintenance in perpetuity of a school for children at Beverly Hills, to be operated under the influence of the Christian Science religion.

SUMMARY OF ARGUMENT.

The Property and Benefits Were Received by a Tax-Exempt Institution Under Section 231 (6) of the Revenue Act of 1924.(*)

The record shows that respondent never declared a dividend; that the three women stockholders and operators thereof received nothing of value by reason of their interest. Although respondent was organized as a private corporation for profit, in substance, it never functioned as such. No part of its earnings inured to the benefit of any private individual. In tax matters, substance must give way to form.

Consideration must be given to the educational and religious features incident to respondent's purposes and also the objective of the large philanthropic group of parents and the donative character of their benefactions. If the contention of petitioner is sustained, it must result in granting to the three Christian Science ladies, stockholders of respondent, the right to have at any time sold the Beverly Hills acreage and school buildings or to have taken in the year 1924 the surplus monies realized from the sale of lots, all of which represented gifts from the parents, and appropriated all of the intended benefits for the school project to themselves for their personal aggrandizement. If petitioner's theories are to be main-

---

(*) Sec. 231 (6). Corporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

tained, a winding-up and liquidation of respondent corporation would result in personal gain to its stockholders of the parents' benefactions.

Respondent or its stockholders played no part in the acquisition of the property other than to acquiesce in the use of its name. The taxable year involved is 1925, yet the efforts of the parents to secure a new school site were first undertaken in the year 1919. The parents were not aware that respondent was a private corporation, or even that the school was a corporate entity; their thought was merely the creation of a new school, perpetually devoted to the furtherance of the religious principles of Christian Science, which faith was possessed not only by all the parents but also by the stockholders of respondent and by the banker, whose charges were reduced to one-third because of the charitable character of the project.

Notwithstanding the religious aspect of respondent, it was necessary that it be chartered as a private educational institution, since the Christian Science Church did not foster private scholastic education and therefore respondent was not permitted to designate in its charter a religious object, contrary to the mandates of the Church.

Respondent was designated as beneficiary of the trust created with the Bank of America as Trustee, to facilitate collections under the sales contracts, transferring titles and disposition of the funds. It was definitely understood by all interested parties, including the bank-trustee, that when respondent should receive the unsold acreage and the net proceeds from the lots sold, it would receive these benefits not for its own use and advantage but in a fiduciary capacity. The funds were at all times so regarded by respondent and were not set up on its corporate

books as its property, but were administered by a committee of the parents. Under these circumstances, coupled with the common understanding as to the dedicatory purpose of the project and the impression of a charitable trust upon the benefits received, under the California law, which is controlling here, injunctive relief would lie on behalf of the parents should respondent fail to live up to its covenants and the understanding of all concerned in relation to the perpetuation of the school enterprise. (*Simons v. Bedell,* 122 Cal. 341; *Cooney v. Glynn,* 157 Cal. 583; *Political Code* (1923), Art. 8, Secs. 470, 472.)

The record clearly exemplifies that all the essential elements of a charitable trust are present in this case. Charitable trusts are basically very similar to private trusts, the chief dissimilarities resulting through the encouragement and favor that the courts have bestowed upon charitable trusts in the long period of their existence.

> "It is said that courts look with favor upon charitable gifts, and take special care to enforce them, to guard them from assault, and protect them from abuse, And certainly charity in thought, speech, and deed challenges the admiration and affection of mankind. Christianity teaches it as its crowning grace and glory; and an inspired apostle exhausts his powerful eloquence in setting forth its beauty, and the nothingness of things without it." II Perry on Trusts, 687; Estate of McDole, 215 Cal. 334.

In the continued effort to encourage charitable acts, the courts have let down the bar on strict interpretation and have consistently relaxed the rules pertaining to private trusts, and have strived without cessation to give full effect to the intention of a benevolent donor. (*Russell v.*

Allen, 107 U. S. 163.) A charitable trust is one for the benefit of indefinite persons to be selected by the trustee from the public generally, or from some particular class or part of it, as was clearly pointed out in *Collier v. Lindley,* 203 Cal. 641. *In re Graham's Estate,* 63 Cal. App. 41.

In *Estate of McDole,* 215 Cal. 334, the court said:

> "It is of the essence of a charity that the beneficiaries are indefinite, the class only being indicated. It is frequently characteristic of charitable trusts that the manner in which the trust is to be carried out is not declared."

Respondent in its private corporate capacity was not the beneficiary; the funds in dispute were not received by this respondent for its separate use or disposition. If so received by it, it was a gift from the parents, which exempts it from income tax, but a sounder theory would be that respondent received same as a fiduciary.

The juristic charitable trust created by the parents, respondent and its three stockholders is a separate taxable entity, created, "organized and operated exclusively for religious * * * or educational purposes" within section 231 (6).

> "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain." *Trinidad v. Sagrade Orden de Predicadores,* 263 U. S. 578.

The Board held that the land was purchased and sold for the school. That the activities of the parents impressed the proceeds with a trust, which respondent accepted; that the school was exempt from taxation since it took the property without cost to it, with the understanding that such trusteed property was to be devoted to a definite charitable use, namely, the establishment and maintenance in perpetuity of a school for children under the influence of the Christian Science faith; and that the parents could, through process of court, enforce the trust or restrain respondent from diversion of the property to other uses. Respondent therefore cannot be taxed upon the funds in dispute unless received by it in a transaction entered into for profit for its separate use, benefit and advantage. (*Eisner v. Macomber,* 252 U. S. 189; *Corliss v. Bowers,* 281 U. S. 376.

Respondent as a fiduciary is not before the Court, since the sixty-day letter charges the respondent with the tax in its individual corporate capacity. Petitioner could with equal effect have sent his deficiency letter to the Bank of America, who, as a trustee of the acreage, first received the profits.

The rule is announced in *Shea v. Commissioner of Internal Revenue,* 31 B. T. A. 513, that the Revenue Act recognizes as a separate taxable entity a fiduciary of a trust and the same person acting in an individual capacity —"income and gains of the two are separately taxed"— and to impose the tax burden, the proper taxpayer must be brought before the Court.

The Property in Question Was Received by Respondent as a Gift.

Property received as a gift is not subject to taxation under the regulations (Art. 73, Reg. 69-Reg. 65). We find much judicial opinion holding that the value of property conveyed, even by business organizations, is not subject to tax, where the consideration moves from others than the donee or grantee.

The value of the property conveyed to a company by a group of business men to induce it to locate its business on the property is not taxed.

Appeal of Holton & Company, 10 B. T. A. 1317.

The donative nature of the transaction is most conclusively evidenced by the absence of an important part played by respondent, it or its officers having made no contribution to the initial down payment of $10,000.00 and the second payment on the purchase price of the land of $100,000.00, or even obligating themselves on the guarantees. The funds were all raised by the parents or through their syndicating agent, Mr. Gilchrist, or through the sale of lots all concluded without the necessity of employing the proffered loan from the bank.

This, however, does not change the nature of the transaction or understanding among all of the persons involved, namely, that the parents acquire the land, subdivide and market the lots to be sold, to realize a fund to be used in the erection of buildings on the unsold acreage, which was to be employed as a Christian Science School, all without financial responsibility on the part of respondent; since respondent possessed only an equity of $12,000.00 in its school property it could play no part in the financing of a $462,180.00 liability.

Petitioner assumes that the delivery of the Declaration of Trust with the Bank, being Exhibit A1 [R. 103], was the generating source of the tax and relies upon section 704 (b) of the 1928 Revenue Act as authority to impose the deficiency. The facts are that the Declaration of Trust was dated the 1st day of June, 1923; in this, the respondent is designated as the beneficiary. The gift to respondent or its assumption of a fiduciary responsibility was completed long before June 1st, 1923. The sum of $10,000.00 as earnest money was paid April 30, 1923. [Petitioner's Exhibit 3, R. 101.] It was on April 13, 1923, when the parents executed their joint and several guarantee in the sum of $250,000.00. [Petitioner's Exhibit 2, R. 100.]

In furtherance of the obligations imposed under the Agreement to Purchase the Land, the parents did, before May 8th, 1923, have available for payment an additional sum of $100,000.00. We therefore find an executed donative transaction prior to the signing of the Declaration of Trust with the Bank. This is further evidenced by a provision of the said Declaration of Trust with the Bank [R. 104], viz:

> "Whereas, the said beneficiary on account of said purchase price has paid to the said trustor, the sum of One Hundred Thousand ($100,000.00) Dollars, collected upon proposed sales of property hereunder, receipt whereof is hereby acknowledged by the said trustor from the said beneficiary."

All parties interested in the enterprise realized the complete success in the marketing of the lots prior to June 1, 1923. The voluntary contributions of the organization of parents of the students attending respondent's school and

their labors in initiating the purchase of the property and effecting the sale of the lots under the parents' plan was fully consummated before the conditions imposed upon the Bank of America as Trustee under section 704 (b) of the 1928 Revenue Act and by its provisions became operative upon the Declaration of Trust. This section petitioner desires to apply retroactively to a charitable and true trust in attempting to gather a tax from respondent, while the section applies only to associations or syndicates. The parents were unincorporated; as an association they could not take title to property. Therefore, it was natural that as a matter of convenience in carrying out the plan of subdividing the property transactions be carried in the name of respondent.

A fundamental difference between the petitioner's and taxpayer's conception of the issue is that of origin; it is the difference between substance and form. Mere form must be brushed aside in order that the true nature, object and substance of the transaction may be ascertained. More than use of respondent's name in the transactions must be shown.

To allow the assessment to stand, would be to allow mere form to govern, whereas, the rule in taxation generally is that substance and not form controls.

Kennedy v. Commissioner, 16 B. T. A. 1372.

Also see, to like effect:

Southern Pacific Co. v. Lowe, 247 U. S. 330;

Gulf Oil Corporation v. Lewellyn, 248 U. S. 71.

An examination of the exhibits without giving consideration to the record might lead to the belief that re-

spondent was a principal in the transaction; however, it cannot be said that the forty or fifty parents, guarantors and contributors, played no part in the consummation of the plan. Nor can it be said that the substance of the whole undertaking was not to secure a new school site for the establishment of a school for their children, with definite objectives and without limitation as to time.

It cannot be seriously contended in the face of the harmonious and exhaustive record that respondent without the aid of its benefactors could have engineered this project and that the Bank without the parents' guarantee would have agreed to loan $100,000.00 as the initial payment to the Rodeo Land and Water Company for the purchase of the tract. The parents, donors, fully completed their agreement, and to this day each and every step in accordance with the solemn promises made by the many parties interested and the respondent have been fully complied with and the conditions surrounding and attached to the donations have been fully executed, resulting in a material public benefit.

Petitioner in his brief imposes upon respondent the burden of showing that the transaction is exempt from tax. A taxpayer claiming an exempt status must assume the burden of proof and show that it falls within the purview of the exemption—this we have done in the immediately preceding topical heading; but where a gift is involved, whether outright or with limitations, the preponderance of evidence rule controls in tax cases. The California Civil Code, sec. 1146 (1923) defines a gift as:

> "A transfer of personal property, made voluntarily, and without consideration."

In the instant case all elements of a gift are present; whether or not there are restrictions or limitations upon the gift is not important from a tax standpoint. A strong presumption exists in favor of respondent, as all the persons interested were Christian Scientists, devoutly interested in their faith and in the rearing of children in a Christian Science atmosphere, who set about to accomplish a definite purpose, not entered into for profit but presumptively in the cause of religion or like charitable purposes.

Conclusion.

It is respectfully submitted that the decision of the Board is supported by unconflicting and conclusive evidence, is fundamentally correct and should be affirmed.

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No. 8122

In the United States Circuit Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

BERKELEY HALL SCHOOL, INC., RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE PETITIONER

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OPINION BELOW

The only previous opinion in this case is the opinion of the Board of Tax Appeals (R. 14–32), which was reported in 31 B. T. A. 1116.

JURISDICTION

This petition for review involves income tax for the fiscal year ending June 30, 1925, in the amount of $12,021.99 (R. 15), and is taken from a decision of the Board of Tax Appeals entered January 31, 1935 (R. 32). The case is brought to this Court on a petition for review filed April 13, 1935 (R. 33–40), pursuant to the provisions of Sections 1001–

1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTION PRESENTED

The taxpayer, a corporation operating a private school, was named beneficiary in a declaration of trust under which a tract of land was acquired and subdivided. Most of the lots were sold and the profits therefrom were paid by the trustee to the taxpayer and the former notified the Commissioner of Internal Revenue that in accordance with Section 704 (b) of the Revenue Act of 1928, it elected to have this income taxed to the beneficiary. The question is whether this money was taxable income in the hands of the taxpayer.

STATUTES INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 219 (a) The tax imposed by Parts I and II of this title, shall apply to the income of estates or of any kind of property held in trust, * * *
>
> (b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. * * *

Section 219 (a) and (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, contains the same provisions as those in the above section.

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 704. TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.
>
> * * * * *
>
> (b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

STATEMENT

The facts as found by the Board of Tax Appeals may be summarized as follows (R. 16–24):

The respondent was incorporated in 1920 under the laws of California as a private educational institution. Its stock since incorporation, has been owned in equal parts by the two Misses Cooper and Miss Stevens. The school was originally organized in 1911 by the former for the purpose of

training children and wards of Christian Scientists.

The school progressed from its inception but the organizers drew no salaries and used the small profits for the purchase of additional property for the school. In 1923, the net value of the property was about $12,000. Because of the lack of recreation facilities for the older children the respondent found, during that year, that it would be impossible to continue and was preparing to close the school and rent the buildings to provide its stockholders with income upon which to live.

When the parents of the children in the school became aware of this condition they called a meeting, at which the situation was discussed and ways of maintaining the school were considered. One plan suggested was to procure a loan for the respondent, upon a guarantee by the parents, of sufficient funds for it to acquire the necessary properties. Pursuant to this plan some of the parents signed a paper agreeing to guarantee a certain amount of money but the guarantee was not used because Mr. Gilchrist, one of the parents who was a prominent real estate operator, learned of a tract of land of 77.3 acres for sale in Beverly Hills. He was advised by the owner, the Rodeo Land & Water Company, that it would give an option to purchase the land for $462,180 payable in installments. A meeting of the parents was immediately called to consider this offer and it

was decided to accept it. Some of the parents advanced the sum of $10,000 which was required as a deposit to secure the option. This sum was later repaid to those who had advanced it and the receipt for such sum was taken in the name of the respondent. Immediately upon the signing of the option, the tract was subdivided into lots by Mr. Gilchrist who computed a sale price for each. These prices were determined by assigning to each lot a proportionate amount of the cost of the entire tract and of the estimated cost of subdivision. There was also added a proportionate amount of the sum necessary to pay for seven acres which were to be set aside as land for the school, plus $80,000 which was determined to be the amount needed for the erection of new buildings. When the prices were computed, the lots were offered for sale to the parents who subscribed for a large number.

The Bank of America of Los Angeles was requested to act as trustee for the purpose of taking title to the tract of land, executing the conveyances of the several lots, collecting the proceeds of sale and paying the development costs and the amounts due to the Rodeo Land & Water Company. Upon the Bank agreeing to act as trustee, the parents caused to be executed a deed of trust which designated the bank as trustee, the Rodeo Land & Water Company as the seller of the property and the respondent as beneficiary. The president of the re-

spondent signed the trust instrument at the request of the committee of the parents' organization which was handling the matter.

Before the title to the land was finally transferred to the trustee, it also received from Mr. Gilchrist, who was in charge of sales, executed contracts for the purchase of most all of the lots, and also cash representing down payments on such purchases in excess of the $100,000 required as the initial payment.

The Board found that the parents of the children in the school had no intention, in arranging for the acquisition of this land by the respondent, that the amounts voluntarily paid by them in excess of the cost of such lots should inure in any way to the personal benefit of the respondent and its stockholders. It was the intention of the parents that the profits accruing thereon should constitute a fund for the establishment and maintenance in perpetuity of a school for children at Beverly Hills to be operated under the influence of the Christian Science religion. The plan and purpose of the parents was understood and acquiesced in by the respondent and its stockholders. The respondent realized that the properties which would come into its hands as a result of these transactions would be received by it only for the establishment in perpetuity of a school of the character desired by the parents. The Bank of America recognized that the purpose of these transactions was

charitable and reduced its charge for acting as trustee to one-third of the usual amount.

The profit realized by the trustee from the sale of these lots in the taxable year 1925 was $111,-883.88. After payment of the purchase price of the land, cost of development, and the trustee's expenses, it paid over the funds in its hand to the respondent, which entered these upon its books in a separate account. The Board found that such funds were expended under a committee of the parents' organization in the erection of buildings on the seven acre tract. The trusteeship of the Bank of America was terminated in 1927 by the transfer of the title of this seven acre tract by quitclaim deed to the respondent as beneficiary of the trust.

After receiving the property, the respondent made an effort to secure the perpetuation of the fund in accordance with the desire and intention of the parents' organization. It offered the property to the Christian Science Church in Boston, Massachusetts, but this offer was refused. Steps were then taken to effect the same result through a permanent trustee, and pending the appointment of such trustee the property has been administered by a board of trustees upon which the three stockholders of the respondent have membership.

The Commissioner determined that the trust under which the Bank of America served as trustee was within the provisions of Section 704 (b) of the

Revenue Act of 1928 and, inasmuch as such trustee filed its election under the provisions of that section to have the income taxed to its beneficiary, the Commissioner determined that a deficiency was due from the respondent because of the fund which was paid over to it by the trustee.

The Board found that the respondent was a corporation organized for profit and not exempt under Section 231 (6) of the Revenue Act of 1924, but held that the respondent received the funds in question as trustee for the purpose of perpetuating a school for the friends of Christian Science and that the money was not taxable income in the respondent's hands. Accordingly, it decided that no deficiency was due.

In contrast to the Board's findings, attention is called to the following facts taken from the statement of evidence (R. 42–149):

Mr. Swarzwald, one of the parents who testified, stated that there was not any special committee of the parents who worked on the plan here in question (R. 54), and that there was no formal organization of the parents but merely an informal group which had no legal status (R. 65–66).

The president of the respondent testified that she went to the Bank of America to arrange for it to act as trustee (R. 71); that she and her associates helped in every way they could to sell the lots (R. 84); that the checks for the improvements on the land were signed in the name of Berkeley Hall

School (R. 85); that the school checked out the money which went to the architect for the new buildings and also for other expenses on the buildings (R. 79, 88); that while the land was still held by the Bank of America, Berkeley Hall School took out a loan for the finishing of four of the new buildings and that she signed the papers for such loan (R. 86).

The declaration of trust (R. 103–123) covering the acquisition of the land here in question was signed by the president and secretary of the respondent, which is named as beneficiary therein. Among other things this declaration provides (1) that the initial payment of $100,000 on the purchase price of the land was paid by the beneficiary to the trustor; (2) that the resale of the land shall be on such terms as may be approved by the beneficiary; (3) that the beneficiary shall at all times pay all taxes and keep the property free from all liens or assessments by reason of improvements thereon; (4) that the beneficiary agrees to install water mains, gas mains, telephone, and electric poles to all parts of the devisee's premises; (5) and that the beneficiary is primarily responsible for all loans on such property and expenses of the trust including the payment of commissions to Mr. Gilchrist and the agents for sales of property. The declaration also provided that in the event the beneficiary should sell, assign, or transfer its interest in the trust, the assignees must agree to per-

form all of the obligations placed on the beneficiary by such declaration.

In an amendment to the trust (R. 144–145), it is provided that the beneficiary shall deposit a sum of $45,000 to be paid out to the contractor upon receipted bills O. K.'d by the beneficiary and such amendment was signed by the secretary and president of the beneficiary, which is the respondent here. In connection with this amendment there was handed to the trustee a check of Berkeley Hall School with a statement from Mr. Gilchrist who signed as "agent" of the Berkeley Hall School (R. 145).

SPECIFICATION OF ERRORS TO BE URGED

The petitioner's assignment of errors (R. 37–39) is incorporated herein fully by reference, but for convenience the assignments are summarized here as follows:

The Board of Tax Appeals erred in failing to find a deficiency in tax of $12,021.99 due from the taxpayer for the fiscal year 1925; in finding that the only consideration passing from the taxpayer for its receipt of the disputed funds and the real estate was the taxpayer's agreement to accept them in accordance with the plan of the parents to establish and maintain in perpetuity a school for children under the influence of the Christian Science faith; in holding that the taxpayer never treated the fund or property as its own, and did not receive either of them for use in its individual corporate

purposes; in holding that the taxpayer received the fund as trustee of a trust created for providing and perpetuating a school for children of students and friends of Christian Science.

SUMMARY OF ARGUMENT

The Board held that the school, which is the taxpayer here, is not exempt from taxation as it is a corporation organized for profit but that it is not taxable on the profit made from the sale of certain land as such funds came from parents interested in the school and must be treated as a trust fund for the perpetuation of the school.

The Board is in error in holding that such profit is not taxable in the school's hands. The land was purchased by the school and sold for it by the Bank of America acting as its trustee. The latter elected not to pay the tax on such profit as it had a right to do under Section 704 (b) of the Revenue Act of 1928, and as it paid the money over to the school, the latter is taxable. The parents were not in a position to and did not impress this money with a trust. They did not buy all of the lots, but even as to those they did buy, the lots which they got were valuable consideration for their money, so there can be no claim that a gift was made to the school. Moreover, there is nothing to show that either the school or the bank made any promise, oral or written, to the various purchasers that the profits would be treated as a trust fund. The contracts for sale of the lots and the deeds given therefor indi-

cate an outright purchase without any conditions attached. If this money could be treated as a trust fund, we would have the queer situation of the school acting both as trustee and as beneficiary. This cannot be denied, for all the witnesses admit that the profits were intended to be used for the benefit of the school and not for any other entity. Thus legal and equitable title would merge in the school and there would be no trust. Accordingly, under either view of the case, it must be seen that the profits belonged to the school and not being an exempt corporation it must pay the tax thereon.

ARGUMENT

The Board of Tax Appeals found that the school, which is the taxpayer here, is a corporation organized to operate a private school for profit. Accordingly, it held that the taxpayer was not exempt from taxation under Section 231 (6) of the Revenue Act of 1924.[1] The Board's finding was correct and we assume that it will now be admitted that the school was a corporation organized for profit during the taxable year 1925.

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[1] SEC. 231. The following organizations shall be exempt from taxation under this title—

* * * * *

(6) Corporations, and any community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual; * * *.

But the Board held that there was no deficiency due from the school on the ground that the net profit which was made on the resale of the land here involved came to the school as a trust fund created by the parents and so was not taxable income in the school's hands. We admit that if the money was paid in the first place by the purchasers of lots as a trust fund, it is exempt from tax, but we deny that this is so. Instead we submit that this is simply a case of the purchase and subsequent resale of land at a profit. Such profit was part of the purchase price paid by the parents and other purchasers but being paid by them without restriction and for valuable consideration, the money was not impressed with a trust and never became a trust fund. So having received the profit as proceeds of sale and not as a trust fund, the school is liable for tax as any other taxpayer would be for gain on a profitable sale.

This profit was paid to the school by the Bank of America acting as trustee in connection with the purchase and resale of the land. The trust under which the bank acted must not be confused with the trust which the Board found was created by the parents There can be no question about the existence of the former for its terms are set out in writing and state (R 103–123) that its purpose is (1) to insure the Rodeo Land & Water Company that the purchase price due from the school would be paid and (2) to facilitate the subdividing and

the sale of the lots on behalf of the school. The three parties involved are the Rodeo Land & Water Company, the bank, and the school acting as trustor, trustee, and beneficiary, respectively. Pursuant to this agreement, the purchase price was paid to the trustor, the costs of subdividing the land were paid and the net profits were turned over by the bank to the school. The bank then filed notice with the Commissioner that, in accordance with permission given in Section 704 (b) of the Revenue Act of 1928, *supra,* to trusts created to liquidate real property as a single venture, it would elect to have the income from such trust taxable to the school as beneficiary. Such notice indicates that the bank considered the profit which had been made taxable income but did not want to pay the tax itself. In accordance with this notice, the Commissioner determined that a tax on this amount was due from the school.

In holding otherwise, the Board stated, among other things, that the school was not a beneficiary within the above section, and indicated that the word is used in its ordinary sense. We agree that this word should be given its ordinary meaning, but we are unable to see why the school is not such a beneficiary. Black's Law Dictionary (3d ed.) defines beneficiary as one for whose benefit a trust is created, and this, we think, is the common meaning. The trust under which the land was acquired and sold was created for the benefit of the school

and the declaration of trust names the school as beneficiary, so there should be no question as to this. Indeed, it appears that the Board is not much concerned with this phase of the case, but considers as the controlling factor its finding that there was another or second trust, set up by the parents who desired that the purchase price of the lots in excess of cost be held as a trust fund for perpetuating the school. So the essential thing to consider here is not the status of the school, but the character of the money which it received. Was the money part of the selling price of the lots or was it a trust fund?

The basis for the Board's conclusion as to this second trust is that the parents made voluntary contributions and that the only consideration given by the school was its agreement to accept the contributions in accordance with the parents' plan, the purpose of which was to perpetuate the school (R. 27). We do not agree that there was a second trust, and at the outset want to call attention to the fact that these so-called contributions were not gifts, and that the Board is in error about the consideration furnished by the school.

As the parents who advanced the $10,000 needed to secure the option were all repaid, the only contribution made in money by any of them was the amounts paid for the lots which they purchased for their individual use. There were 375 lots sold (R.

126). We do not know how many were purchased by the parents but we do know some were sold to outsiders. We also know that the prices were determined before it was known who would buy them, and the method used by the experienced real estate man in charge was the same for all lots and the same as that used by any one who is seeking to realize a quick profit from a real estate venture. None of the prices were exorbitant and many ranged from $1,000 to $1,500 (R. 124–126). Accordingly, regardless of the motive which actuated the purchasers, they were receiving valuable lots in Beverly Hills in return for their money and so made no gift in making the purchase. Only one of the four parents who testified mentioned the returns but that one stated that he later sold one of his lots at a large profit (R. 58). From this we may infer that the venture also proved profitable to the parents and the others who got the lots.

So it must not only be admitted that the parents received valuable consideration for the money they spent but also that such consideration was furnished by the school or its trustee, the Bank of America, for there was no one else in a position to sell the lots. It may be that the parents could have bought the tract of 77 acres direct from the Rodeo Land & Water Company, but the fact is that they did not do so. There was an attempt made through all of the testimony to treat the school as a figure head but careful analysis of the evidence shows

that this is not the fact. The school's officers, or its agents, actually carried on the negotiations and either the school or the bank assumed all obligations ordinarily imposed by such dealings.

The idea of acquiring more land and buildings was not a new one. The school's president testified that the school had made three moves before this land was purchased and had constantly tried to secure more adequate facilities (R. 67–68, 78). When the parents learned of the difficulties the school was having, meetings were held and it was agreed by those present that they would act as guarantors of a loan if the school could secure one. But later it was decided that the better plan would be for the school to buy the tract of land here involved. It was figured out that a small part of the land could be set aside for the school and the rest could be subdivided and sold at a profit large enough to furnish money for new buildings. There is nothing novel about this plan as it has been adopted by many people desirous of making quick profits, and it is not unusual for a company or an individual to embark on such a venture with practically no money. Accordingly, we must not be misled by the fact that the school had very little funds to start with and had other purposes besides that of making a profit. Undoubtedly the venture was undertaken by the school for a profit, and the money which was made was just as much the school's as if it had been able to negotiate with the vendor direct and without help from the parents.

To understand the extent the school was actually involved in this undertaking, we must study the trust which was set up to handle the negotiations. The president of the school personally arranged for the Bank of America to act as trustee, and she and the secretary signed the Declaration of Trust (R. 103–123). This declaration states that the Rodeo Land & Water Company, as trustor, has agreed to sell and convey to the Berkeley Hall School a certain tract of land; that the initial payment of $100,000 has been paid by the school, that the trustee is to hold the land for resale and is to pay the profits, in excess of the purchase price and other costs allowed therein, to the school as beneficiary; that Mr. Gilchrist is to act as agent of the trustor and the beneficiary in subdividing the land and in installing improvements for a commission named therein; that the school is to be liable for all taxes and assessments and has agreed to install water and gas mains, and telephone and electric poles, and the right of the school to assign its interests is recognized but its assignee must assume the school's obligation thereunder. The parents were not involved in this trust. Instead, it is obviously a business proposition between the school and the other two parties, and the fact that the school assumed certain obligations for itself and got certain assignable interests without conditions being attached contradicts the idea of its being a figurehead. Moreover, when the money was received by

the school, it continued to take the responsibility and proceeded to spend the money for the new buildings and the facilities which it had needed (R. 78–79). When it was found that the profits from the land would not be enough, the school then borrowed additional funds, using its new assets as security (R. 86, 88). Thus it is apparent that the school was actually the owner of the property, not a trustee, and that it made the various expenditures in accordance with the plans which it had long had for the development of the school.

This is important because the Board's opinion indicates that the parents were in a position to and did attach certain conditions to the services they rendered which would cause net profits received from the lots to be impressed with a trust. The Board refers frequently to the parents' organization and also to a committee representing the parents, but these references are not supported by the facts. Mr. Swarzwald, who was one of the parents who offered his services, stated that he did not know of any special committee of the parents, that Mr. Gilchrist engineered the whole thing, and that the parents did not have any formal organization and had no legal status (R. 54, 65–66). The Board refers to Mr. Gilchrist as managing the subdividing but does not state that he was acting as agent for the school. However, it cannot be denied that he was the school's agent for he designated himself as agent in signing his name to

papers (R. 145), and the Declaration of Trust referred to him as agent (R. 107). Also, it was admitted that he was paid a commission as agent and that his real estate office sold the lots (R. 58). From this it is clear that outside of Mr. Gilchrist who was employed by the school to act as its agent, the chief, if not the only real, service rendered by the parents was their purchase of lots for which they got value received.

The Board appears to ignore the lots as consideration and indicates that the only consideration which the school gave in return for the money was its promise to use the money in accordance with the parents' wishes for perpetuating the school (R. 27). The Board states that it is this promise which caused the net profits to be a trust fund. However, the evidence does not show that there was a promise but does show that the lots came from the school's trustee.

To be effective as consideration, the promise should of course have been made to each purchaser but there is no evidence to show that any promise of this character was made to any purchaser. The contracts of purchase for the lots were very long and detailed and were signed by the bank as trustee for the school and by the purchaser (R. 127–136). Neither these contracts nor the deeds covering the lots (R. 136–143) contain any terms which would indicate that the purchase money was to be treated as a trust fund.

Moreover, none of the four parents who testified stated that the school had promised to hold the purchase money in trust. The school's president also testified but she did not indicate that either she or her associates had ever made any promises to the several purchasers as to the money. Instead, she stated that the selling of the lots was largely handled by others and indicated that she had little contact with the purchasers. From this it will be seen that there is no basis in the evidence for the Board's finding that such a promise was made and was consideration for the money paid to the school.

Thus it is apparent that instead of relying on evidence of actual promises, which might be treated as consideration for payment of the money to the school, the Board has been influenced by a number of indefinite statements by the witnesses as to what they expected the school to do or what they knew the school intended to do. These statements are, in substance, that the parents intended to give the land and money to the school and that such property was to be used to perpetuate the school (R. 51, 57). But as we have pointed out the plan as actually worked out did not result in gifts being made. Instead it resulted in purchases of a number of lots by the parents from the school. Such purchases of course helped the school to make a profit but this was not the same as making a gift to the school. The parents received value in return for

the money they paid out and got no definite or express promise as to how the purchase money would be used. Consequently they are not in a position to claim that they could force the school to use the funds in any particular way. In other words, after the lots were received by the purchasers, the contract relation came to an end and they had no rights which they could enforce against the school.

However, regardless of these facts, the taxpayer contends and the Board has found that there was a trust relation existing between the parents and the school. But we submit that this finding ignores well established principles of trust law. It is of course fundamental that the person who creates the trust must own the property which is to be the subject of the trust, for obviously one cannot grant that which does not belong to him. Bogert on Trusts and Trustees, Vol. 1, Sec. 44. So as to the seven acres of land which the school kept and which it now claims to have received in trust, there can be no question but that this is owned outright by the school. The parents at no time had either equitable or legal title to this tract and of course could not make it into trust property.

As to the money which the taxpayer also claims is a trust fund, we have already pointed out that this came to the taxpayer, or the school, as the purchase price for the lots it sold. Under these circumstances, it is apparent that the money was derived from ordinary sales and if this is not the fact the burden is on the school to show otherwise.

This is so because in tax cases the burden is on the one claiming the exemption. This is a heavy burden because exemptions are not to be lightly inferred and any well founded doubts are to be resolved against the one claiming the exemption. *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235; *Pacific Co.* v. *Johnson,* 285 U. S. 480, 491; *Trotter* v. *Tennessee,* 280 U. S. 354.

The burden is also on the school here to show that a trust was created by the parents because the existence of a trust will not be assumed in the absence of clear and convincing evidence. A trust as to personal property may be created by a parol agreement or may be implied from the acts of the parties, but in such case the evidence must be such as will admit of no other interpretation than that it was the intention to create a trust. *Trubey* v. *Pease,* 240 Ill. 513. This means that there must be evidence of acts or words of the trustor which will indicate with reasonable certainty that it was the intention of said trustor to create a trust, and the terms, purpose, and beneficiary of the trust must also be definitely proved. *Noble* v. *Learned,* 153 Cal. 245, 250; *Simpson* v. *Simpson,* 80 Cal. 237; *Burling* v. *Newlands,* 112 Cal. 476.

Here as we have already stated, if a trust fund was created, there was not merely one person or one group which acted as trustor but there were as many trustors as there were individual purchasers of lots. We do not know how many lots

were purchased by the parents and how many by outsiders. Moreover, there is not a scintilla of evidence in regard to what motives actuated the outsiders in buying the lots, and only four parents testified as to the lots which they purchased. At most, all that the testimony of the latter shows is that the parents who attended the meetings placed confidence in the school owners and expected them to use the money for new buildings and facilities. Merely reposing confidence in another does not of itself create a trust or make a trustee of the one in whom confidence has been reposed. *State* v. *State Journal Co.,* 75 Neb. 275. Thus we find that we know nothing of the intention of the majority of the purchasers and as to the parents who testified there was merely a showing of confidence placed in the school organization as it then existed, and the hope that it would use this money for the best interests of the school. We submit that this is far from proving that there was an intention to set up a trust fund and does not overcome the convincing evidence that the money came to the school unrestricted and in a regular business transaction.

The Board states that another reason for its conclusion is that the school did not treat this fund as its own or receive it "for use in its individual corporate purposes", but acted as trustee of the fund "for the purpose of providing and perpetuating a school for the children of students and friends

of Christian Science" (R. 28). We think it is pertinent to ask what difference is there between "the individual corporate purposes" of the school and the purpose for which the Board thought this trust fund was created. Is it not too plain for argument that one of the purposes of the school from the beginning has been the perpetuation of a school for Christian Scientists. Also, how can it be said that such purpose was not "an individual corporate purpose", or that the amounts spent for new buildings, although larger, were any more for the perpetuation of the school than any of its current but necessary expenses. We submit that it is established by undisputable evidence that the school received this money and used it, not for any new or different purpose, but for one of the purposes which had existed since its establishment. We do not see how this can be denied in view of the testimony of the school's president that she and her associates, all during these years, had made a constant attempt to improve and increase the school's facilities; had moved the school three times before this land was acquired; were always thinking of ways by which they could raise money for the school and in some years had used all of the school's profits to pay interest on the mortgages and for more land (R. 67–69, 78). Moreover, in spite of some statements to the contrary, it is apparent that the school did accept the money as its own, assumed the responsibility for spending it,

and borrowed more money by using the property it got as security for the loan (R. 78–79, 86).

It may be true that the school's officers felt themselves bound to use the money for new buildings but this was actually no more than a moral obligation. But even if this were a legal limitation on the way in which the school could use the money, such limitations would not amount to the imposition of a trust and would not prevent the fund from being income to the school. Cf. *Standard Slag Co.* v. *Commissioner,* 63 F. (2d) 820 (App. D. C.); *Cleveland Ry. Co.* v. *Commissioner,* 36 F. (2d) 347 (C. C. A. 6th), certiorari denied, 281 U. S. 743. Moreover, the school's president admitted that since receiving the money, they had attempted to convey the school property to a permanent trustee but had not done so because they had had some difficulty in creating the trust (R. 80–81). Thus it appears that the parties themselves realize that until such trust is created, their obligations as to the new assets are merely moral and not legal.

There is a further important objection to the view taken by the Board. Even assuming that the purchasers intended to create a trust fund, there can be no trust as to this money for both the legal and equitable titles would be in the school and in such case no trust would come into existence. It is essential to the existence of any trust that there be a separation of the legal estate from the equitable enjoyment and no trust can exist when the same

person possesses both for when the two come together there is a merger and the trust ends. *Simpson* v. *Simpson, supra; In re Lamb,* 61 Cal. A. 321, 328; *In re Walkerly,* 108 Cal. 650; *Moras* v. *Cornell,* 49 R. I. 308, 315; *Wilson* v. *Harrold,* 288 Ill. 388; *Somers* v. *O'Brien,* 129 Kan. 24; 26 R. C. L. 1186; Perry on Trusts and Trustees (7th ed.), Vol. 1, Sec. 13.

An attempt may be made by the respondent to show that it was not the beneficiary of this so-called trust fund but the evidence will show otherwise. There are some vague statements as to the purpose of this money raising plan, but these cannot hide the fact that all who were interested were trying to help the school as it then existed, that they had nothing but praise for its management and desired nothing more than that it be allowed to continue as formerly but with improved facilities. Consequently, the plan for buying real estate was adopted to help the school perpetuate itself and the school received the money for its own benefit, and as rightful owner of the fund. In this respect, the instant case is obviously distinguishable from the line of cases in which cemetery lots are sold by the taxpayer who agrees to hold a portion of the purchase price as a trust fund to provide for perpetual care. As shown by the facts in *Portland Cremation Ass'n* v. *Commissioner,* 31 F. (2d) 843 (C. C. A. 9th), there is a definite agreement in those cases as to the trust fund and the beneficiaries are the pur-

chasers of the lots and have interests entirely distinct from the company which holds the fund as trustee. The situation is different here and the opinion of this Court in the *Portland* case indicates the weaknesses of the taxpayer's contention in the instant case that a trust fund was created.

Viewed in its entirety, it is apparent that this is simply a case of a private school adopting an ordinary real estate venture as a means of realizing a quick profit for use in carrying on its corporate purposes. That it was encouraged to embark on this venture by interested parents does not prevent the profit from being ordinary income in its hands and having failed to prove otherwise, we submit that the school is liable for income tax on such amount.

CONCLUSION

The decision of the Board is not supported by any substantial evidence and is contrary to well established principles of the law of trusts. Accordingly, its decision should be reversed.

Respectfully submitted.

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